United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 8893.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS, APPELLANTS,

versus

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

THOMAS BOYLAN,
Philadelphia, Pa.,
ROBERT L. EDMISTON,
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RAYMOND M. HUDSON,
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GEOFFREY CREYKE, JR.,
Washington, D. C.,
Attorneys for Appellants.

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BRIEF FOR APPELLANTS.

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FOREWORD.

When these appellants filed their application for this appeal, which was granted, there was also filed a petition for an appeal for the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, to each of the following decrees entered in the equity cause entitled *United States of America* vs. *Northern Pacific Railway Company, et als.*, being No. E-4389 in the District Court of the United States for the Eastern District of Washington, Northern Division, on May 24, 1932, October 3, 1935, the decree amending same on January 29, 1936, March 9, 1938, and the two decrees of March 22, 1938, which said application for appeal is still pending before this Court and undetermined. Appellants and those associated with them own approximately 32559 shares of stock of the Railroad Co., the balance is owned by Railway Co. (R., ...).

In opposition to the last mentioned petition for appeal as well as the one of the intervening petitioners, which was granted, the United States filed a brief and the Northern Pacific Railway Company and others filed a brief and a supplemental brief. Thereupon, Charles E. Schmidt and others, minority stockholders, filed a point reply brief in answer to the said briefs of the Government and the railway company which is entitled, "Reply Brief of Appellants."

As the petition for appeal of the railroad company by, &c., has not been acted upon by this Court, the said "Reply Brief of Appellants" with certain changes, additions and slight curtailments is being herewith printed as part of the appellants' brief with the request that the said application be considered by the Court on the printed record along with and at the time of the hearing of the appeal on the merits, and that the said petition for appeal of the railroad company by, &c., be forthwith granted and the decrees appealed from reversed. (All italics in this brief supplied.) The said "Modified Reply Brief of Appellants" is in the appendix p 16.

JURISDICTION.

This Court has jurisdiction of this appeal under U. S. C. A. Title 28, Section 225. This Court allowed this appeal (R., 1271, 1278).

The lower court had jurisdiction of the suit under the Act of June 25, 1929, 46 Stats. 41 Sects. 1, 5, U. S. C. A. Title 43, Section 921 to 929.

STATEMENT OF PLEADINGS.

The United States filed a bill July 31, 1930 (R., 1), purporting to be a compliance with the mandate of the statute, being the Act of June 25, 1929, requiring the Attorney General to bring a suit for the adjustment of all matters between the Government and the Northern Pacific Railroad Company, Northern Pacific Railway Company and between each other and other interested parties, and all disputes which were before the Joint Congressional Investigating Committee, to make findings of fact and determine the validity of the so-called foreclosures of 1875 and 1896. The bill and subsequent amendments illegally assumed that the title of all the properties is in the Ry. Co. and asked judgment against the Ry. Co. only and did not put in issue or present for determination the so-called foreclosures of 1875 and 1896 or the disputes before the Joint Congressional Committee as directed by the Act of June 25, 1929.

This bill was amended by stipulation on June 25, 1931 (R., 228) and another amendment to the bill was filed August 1, 1938 (R., 1251, 1256). The amended and supplemental answer was filed by the railway company July 18, 1931 (R., 244).

The railway company, through its attorneys filed on January 18, 1932 (R., 417), a disclaimer for the railroad company in which it disclaimed any right, title or interest in the subject of the suit. The railway company, through its attorneys filed May 9, 1932 (R., 420) an answer for the railroad company adopting the answer of the railway company.

The cause was erroneously referred to a master on the pleadings May 24, 1932 (R., 423), and he filed his report May 31, 1933 (R., 428), to which exceptions were filed by defendants on June 20, 1933 (R., 662), and by plaintiff on July 8, 1933 (R., 664). The Court rendered an opinion on September 9, 1935 (R., 674), and in accordance therewith on October 3, 1935 (R., 680), confirmed the report and on January 29, 1936, amended said decree (R., 681). The Court sustained the motions to dismiss Paragraphs VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff,) XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI and XXXVIII, of the bill and sustained special pleas.

On April 21, 1936 (R., 684), the cause was referred to the commissioner for further report on the deficiencies under the grant. The commissioner filed his report thereunder July 26, 1937 (R., 690). The plaintiff filed on Aug. 13, 1937, exceptions (R., 893), and the railway company for itself and for the railroad company filed exceptions (R., 887) August 9, 1937, and supplemental exceptions August 11, 1937 (R., 891).

The railroad company by Schmidt and others, minority stockholders, on August 25, 1937 (R., 951), filed a motion to extend the time within which to file exceptions and before the motion was determined the said exceptions were filed on February 19, 1938 (R., 1185). On September 3, 1937, the Northern Pacific Railroad Company by Schmidt and others, minority stockholders filed an answer and cross bill (R., 952), putting in issue all the matters required by the Act of June 25, 1929, and asserting that all the railroad properties were and still are the property of the railroad company and no title to any of same was ever passed to the railway company. In Paragraph XXI and several others leave was asked to further answer the bill after examining the files and records of the railway and railroad companies. Plaintiff filed a motion to strike same Sep-

tember 13, 1937 (R., 1026), and the railway company for itself and the railroad company filed a similar motion September 15, 1937 (R., 1032), which the Court seemingly treated as a motion to dismiss; neither motion raised the defense of laches.

The appellants, on January 31, 1938 (R., 1936-7), filed an intervening petition and joined in exceptions filed by the railroad company by minority stockholders and motions to dismiss the amended bill and re-refer the matter to the commisisoner and construe the commissioner's report. The intervening petitoners, being the minority stockholders of the railroad company, sought the same relief that was sought in the answer and cross bill of the railroad company. The motions to strike were granted by the decree of March 9, 1938 (R., 1187), from which decree this appeal was granted (R., 1271). This was a hearing as on a demurrer and opened whole record, and the pleading first at fault is cost.

The same decree denied a motion of the rairoad company by minority stockholders and by appellants to construe, modify, and amend the second report, which motion was filed February 19, 1938 (R., 1182), and said decree also denied exceptions of the appellants and the railroad company by minority stockholders, which exceptions were filed February 19, 1938 (R., 1185). Appellants and the railroad company by minority stockholders filed on March 11, 1938 (R., 1192), a petition to review and amend the decree of March 9, 1938, which also asked leave to make the intervening petition a part of the cross bill (R., 1190). This was denied March 22, 1938 (R., 1209), after modifying the decree, through this cause: "It is further ordered that this Order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Hanehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed

or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross bill and in said intervening petition.''

This decree also denied a motion of the railroad company by minority stockholders filed March 17, 1938 (R., 1207), to dismiss the original and amended bill of complaint. The questions of law involved are set out succinctly under the Points in the preceding index.

Another decree of March 22, 1938 (R., 1211) sustained Government's exceptions XII, XVI to XXVII inclusive, XXXVIII, XXXIX, XL, XLIV, XLVIII, XLIX, LV, LVI, XLIII in part, and denied Government's exceptions I, II, IV, V, sub-division (a) of III, VI, VII to XI inclusive, XIII to XV inclusive, XLI, XLII, XLV, XLVI, XLVII, L, LII, LIV, LVII, LVIII; it denied exceptions of the railway company I, II, III, IV, and sustained supplemental exceptions I and II, to the Master's Second Report. No findings of fact or conclusions of law have been filed or entered of record by the Court under either the decree of March 9 or either of the decrees of March 22, 1938.

The Government gave notice in the fall of 1937, that it would later ask leave to amend and the amendment was presented to the Court before appellants saw it and without their being present and leave was granted to file same (R., 1256) on August 1, 1938, as hereinbefore explained; the amendment assumed that the properties all belong to the railway company and not to the railroad company and prayed judgment against the railway company and not against the railroad, and the railway company had its attorneys sign a stipulation for the railway company consenting to the amendment (R., 1255); the attorneys signed as ''Solicitors for Defendants'' evidently intending to represent the railroad company.

This is another act of the railway company and its attorneys, which is very prejudicial to the railroad company and indicates an understanding or working together with the Government to prevent decision of the matters required by the mandate of the statute.

On August 29, 1938 (R., 1258), the Northern Pacific Railroad Company by minority stockholders and appellants filed their respective motions to strike out the said amendment to the amended bill, the stipulation (R., 1257) and the decree filing same dated August 1, 1938 (R., 1256).

On September 3, 1938 (R., 1240), the railroad company by minority stockholders filed a motion to dismiss, answer and cross bill to the amended bill and the amendment thereto. No motion to strike the said motion to dismiss and answer and cross bill have been filed by any of the parties hereto.

The 25 Points of Law for Argument and the Assignments of Error relied upon are hereinbefore stated and they are raised on either the rejection of the Intervening Petition, answer and cross bill, motion to dismiss, or exceptions.

STATEMENT OF THE CASE.

The Northern Pacific Railroad Company was chartered as a corporation to "have perpetual succession" by the Act of Congress of July 2, 1864 (13 Stats. 365), some of the relevant sections of which are in the record, with an authorized capital of one million shares of the par value of $100.00 each, for the purpose of building a railroad and telegraph line from a point on Lake Superior in the State of Minnesota or Wisconsin by the most eligible railroad route within the United States on a line north of the 45° of latitude to some point on Puget Sound with a branch by the Columbia River to a point near Portland, Oregon.

Section 2 enacted "That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of *two hundred*

feet in width on *each side* of said *railroad* where it may pass through the public domain, *including all necessary ground* for station building, workshops, depots, machine shops, switches, side tracks, turn- tables, and water stations; and the *right of way shall be exempt from taxation within the Territories of the United States.* The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill."

The land and property so granted in Section 2 could not be sold, transferred or conveyed by the railroad company by deed, lease or other contract.

Section 3 granted, for the purpose of aiding in the construction of the said railroad and telegraph line, *twenty alternate sections* of public land *per mile* on *each side* of the railroad line through the *territories* and *ten* on each side through the *states* traversed, with provisions as to other lands in lieu thereof. Mineral lands were not granted but agricultural lands were granted in lieu thereof within fifty miles of the railroad; these lands granted under Section 3 could be sold by the railroad company under certain conditions.

Section 10 in part provided: "And no mortgage or construction bonds shall ever be issued by the said company on said road or mortgage or lien made in any way except by consent of the Congress of the United States."

Congress reserved the right to alter, amend or repeal the Act.

On March 1, 1869, Congress passed a resolution (15 Stats. 346, 13 Stats. 370): "That the consent of the Congress of the United States is hereby given to the Northern Pacific Railroad Company to issue its bonds, and to secure the same by mortgage upon its railroad and its telegraph line, for the purpose of raising funds with which to construct said railroad and telegraph line between Lake Superior and Puget Sound, and also upon its branch to a point at or near Portland, Oregon; and the term 'Puget Sound,' as used here and in the act incorporating said com-

pany, is hereby construed to mean all the waters connected with the Straits of Juan de Fuca within the territory of the United States."

This resolution was found to be defective and ineffective, as no authority was granted to issue the bonds or mortgages, and it was superseded by the Joint Resolution of May 31, 1870 (16 Stats. 378), which enacted: "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of Interior." (The entire resolution is in the appendix hereto.) It provides that this resolution may be altered or amended but has no provision for repeal.

The Supreme Court later held that a corporation could not convey or encumber its "franchise as a corporation."

On July 1, 1870, after thorough investigations by the officials and engineers of the company and other experts that the railroad would be approximately 2,500 miles long and that it would require $50,000 per mile to build and construct, the mortgage and loans thereunder were executed and recorded, providing for $50,000 bonds for each of the 2,500 miles, being a total of $125,000,000 in bonds, of which approximately $30,780,904 were issued (R., 1100). The main line Ashland to Wallula, Cascade Branch, Pasco to Tacoma, Portland, to Tacoma and Bridges comprise 2,133.1 miles and cost $67,271,251.78 (R., 1158).

This was the only mortgage ever authorized and consented to by Congress and the execution of this mortgage and the bonds exhausted the power and authority to execute a mortgage and bonds under the statute. This mortgage was not a lien on the roadbed of 200 feet on each side of the railroad and the other land, grounds, material, and equipment granted in Section 2 of the charter act but was only a lien on the land granted by section 3 of said act and

the lands granted under the Joint Resolution of May 31, 1870.

The construction proceeded until the panic of 1873 and then there were delays, financial difficulties and extensions of time by Congress. On April 16, 1875, a suit was filed in the United States Circuit Court for the Southern District of New York entitled *Jay Cook* vs. *Northern Pacific R. R. Co,.* having for its purpose the foreclosure of the mortgage and the sale of the property, lands and assets of the railroad company, but that Court was without jurisdiction of the subject matter, as no part of the road or any of its lands or property was in New York and there was no jurisdiction of the person of the corporation as a party to the suit. The Court, though, did enter a decree of foreclosure but afterwards suspended it and it never again was put into effect nor was any action or proceeding ever taken or had under it. There was no sale or attempted sale of the properties, lands or assets of the company (R, 979).

While the suit was pending a Committee of Bondholders was formed, and it arranged for a reorganization whereby, briefly, the stockholders agreed among themselves and with the creditors and bondholders that 510,000 shares of the stock of the railroad company, which is often spoken of as the Federal corporation, would by agreement thereafter be preferred stock (R., 986) with a voting right and other preference over the common stock and the preferred stock was to be called in, paid and cancelled out of the proceeds of the sales of certain of the lands granted to the company by the Government. The remaining $49,000,000 of the stock was to be common stock (R., ...) without any other change of its status, and the preferred and common stock was exchanged for debts and obligations of the railroad company and for the 7.3% bonds issued under the mortgage of July 1, 1870, some of which bonds were put into the treasury of the company for the benefit of the preferred stockholders who had held same and who had paid debts, but the larger portion was deposited with the Farmers Loan & Trust Company for the same purpose (R., 1102).

In accordance with this arrangement and the reorganization plan, which is Exhibit F(1) to the amended bill (R., 979), which was an exchange of securities, no title or possession of the properties, lands or assets of the railroad company ever passed from it, although numerous null and void deeds were executed by the so-called Master Commissioner and the so-called receiver in said suit to the Committee of Bondbolders and by Cooke and Tower, trustees, to the Committee, set out in Paragraphs XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII and LIII of the cross bill, and by the Bondholders' Committee to the Northern Pacific Railroad Company (R., 987 to 991).

Thereafter, the officials of the railroad company and of the railway company strenuously contended until 1924 (R., 1145), by pleadings and briefs in various suits (R., 994), some of which were sustained in various courts, as well as before Executive Departments and Congressional Committees, that there was a legal and valid foreclosure of the property, assets and lands of the railroad company in 1875, and that all right, title and possession thereto passed out of the said railroad company—the Federal corporation—and into some new company.

They also contended that the following mortgages were executed by this proposed new corporation or association or organization, the exact charater of which has never been defined or made plain. The mortgages are named and dated and identified as follows:

Exhibit G.—Missouri division mortgage, May 1, 1879 (R., 993, 1140), satisfied and released July 2, 1900.

Exhibit H.—Pen d'Oreille division mortgage, September 1, 1879 (R., 993), satisfied and released July 2, 1900.

Exhibit I.—General first mortgage, January 1, 1881 (R., 993, 1146), satisfied and released November 17, 1899.

Exhibit J.—General second mortgage, November 20, 1883 (R., 993).

Exhibit K.—Third mortgage, December 1, 1887 (R., 993).

Exhibit L.—Consolidated mortgage, December 2, 1889 (R., 993).

It is alleged (R, 1147): "In each of these so-called

mortgages, the plan of reorganization of 1875 is recited together with the averment that the mortgage is executed with the voted consent of three-fourths of the preferred stockholders as provided by that plan."

The trustee under the said mortgages, as well as the bondholders, took, accepted and received the mortgages and bonds with full knowledge of all the foregoing facts and of all the defects and invalidity of the same. The record shows under the facts alleged and the law and decisions of the Supreme Court of the United States that each and all the foregoing mortgages are absolutely null and void and were so known to be by the trustees and the purchasers of the bonds at the time of their execution, delivery and sale.

In 1924 or 1925 the *officials* of the *railway company,* who dominated, controlled and held in captivity the railroad company, whose officials were dummies of the railway company, switched completely around, and admitted and contended that there was no foreclosure of any kind, character or description in 1875, that no title or right or interest in and to the property, assets and lands of the railroad company—the Federal corporation—passed from it in 1875 but that the entire proceeding in 1875 was merely an exchange of securities.

It seems very clear from the record that it was merely an exchange of securities and the Committee of Bondholders were merely trustees or a committee who operated the road for some years.

Congress, though, by the Act of June 25, 1929, has *refused* to *accept* this *admission* of the *railway* and the *dummy railroad officials* and has *required* that the *Court* find the *facts* and *determine whether* or not there was a *valid foreclosure* in *1875* and also in *1896,* but the *Attorney General* is *persistently seeking* to avoid and *prevent* such finding of fact and determination by the Court and *has violated* the *mandate* of the statute in refusing to put same in issue, and in *assuming* that *both were valid* and *legal foreclosures* and that all the property, assets and lands granted under the Act of July 2, 1864, and the Joint Reso-

lution of May 31, 1870, and obtained otherwise and at other times by the railroad company have passed to, by good and sufficient title, and are the absolute property of the *railway company,* and the *Government* is *seeking judgment against* the *railway company* and *not* against the *railroad* company; the Attorney General has persisted in this course up to the filing of an amendment to the amended bill on August 1, 1938 (R., 1252 and 1258, 1260), and in said amendment.

While appellants believe that, under the facts alleged in the cross bill and answer and the intervening petition and the other facts shown by the record and the law applicable thereto, the so-called foreclosure proceedings and reorganization of 1875 was not a legal or valid sale or foreclosure of the property, assets and lands of the railroad company and that no title thereto passed out of the railroad company and that it was merely an exchange of securities and a temporary change of operation, yet appellants believe and contend that the *Act* of June 25, 1929, *makes it mandatory on the Court to make a finding of fact and determination of the law as to whether or not the so-called foreclosure proceedings of 1875 were legal and valid and title passed out of the railroad company.*

As this appeal is to a decree of the lower court denying leave to file the intervening petition, and as it was heard by that court and will be reviewed by this Court as on a demurrer, or rather, a motion to dismiss the intervening petition raising a question of law as to its sufficiency, the facts alleged being admitted, and whenever a cause is heard as on a demurrer under the well-known axiom, the demurrer opens the whole record and the party who was first guilty of filing a defective or insufficient pleading shall be cast.

The so-called railway company was incorporated as the Superior & St. Croix Railroad Company on March 15, 1870, naming and providing for 11 incorporators, under special act of the Legislature of Wisconsin *only* as a *local* and *state railroad* to build a line from the west shore of the Bay of Superior to the south shore of the Bay of St. Louis

to a *certain point on* the *Minnesota line* north of the Nemadji River (R., 997-8).

Contrary to and in violation of the laws of Wisconsin, which required a majority of the incorporators to constitute a quorum at the organization meeting and other meetings, six of the incorporators did not attend the first meeting of the incorporators on February 4, 1871, or any of the meetings of the incorporators or stockholders; whether all of the remaining five attended is not shown by the record, but never more than five of the eleven incorporators ever met in any meeting of the incorporators or stockholders (R., 998), and all the meetings were illegal and void.

The said Superior & St. Croix Railroad Company was never duly or legally organized and never functioned or operated as a legal corporation (R., 998).

On *October 13,* 1871, (JCC 3521, 3534-8) the railway company entered into a contract with Walbridge Bros. & Sargent to build a railroad for it from a point on the Bay of Superior to a point of connection with the Northern Pacific Railroad in Carlton County, Minnesota, at Thompson's Junction (R, 1132, 9, 1141-2). Part of the consideration for this was certain bonds issued by Douglas County and 3800 shares of the stock of the so-called railway company (R., 1142). Considerable grading was done, but *no part* of the *railroad was built,* and the work was terminated because of the depression of 1873, and because the Douglas County bonds had been illegally issued, and were void, and because it extended 9 miles into Minn. that making it an interstate road in violation of the Ry. Co. Charter which was limited to a state road.

Congress by the act of February 27, 1873 (17 Stats. 477, the act is in appendix hereto) authorized the Northern Pacific *Railroad* Company to build a draw bridge across the St. Louis River from Rice's Point, Minnesota, to Connor's Point, Wisconsin, and made it a post-route and fixed the rate for mail, troops and munitions "and the United States shall have the right of way for postal-telegraph purposes across said bridge."

On June 5, 1873 (R., 1131), the Superior & St. Croix passed a resolution to construct its branch or extension from the Nemadji River along the Bay of Superior to the end of Connor's Point and thence to the main channel of the St. Louis River and to construct or procure to be constructed from said main channel to Rice's Point in the State of Minnesota a railroad so as to form a continuous railway connection with the main line of the Lake Superior and Mississippi railroad in Duluth, and it resolved for this purpose to construct a bridge across the St. Louis River at Connor's Point to Rice's Point and it asked for leave to do so from the Board of Supervisers in the town of Superior; and on July 21, 1873, it was on motion of Mr. Canfield resolved that the plan of bridge across the St. Louis River between Rice's Point and Connor's Point prepared by Wm. Milner Roberts, Chief Engineer, and that day submitted to the Board and marked "A" be approved (R., ...). Thus the Superior & St. Croix was under its local state charter to do that which Congress had given authority to the railroad company—the Federal corporation—to do.

Minnesota by an Act of February 14, 1879 granted the Railroad Co. permission to construct, lease and operate railroads in that State—the Act is set out in full in the record (R., 1162).

On June 26, 1873, the railroad company entered into an agreement with the railway company whereby the railroad company was to build for the Railway Company (and later did build but in its own name) a railroad on the line located from the Bay of Superior to Thompson's Junction. The 3,800 shares of stock of the railway company under this agreement were transferred from Walbridge Bros. & Sargent to the railroad company, and there was paid on the said stock $56,560 prior to July 21, 1873, as admitted and testified to by Stetson, director and general counsel of the railway company (R., 1108-1110).

The said 3,800 shares of stock were voted by the railroad company at the meeting on August 31, 1880, and the

only other stock outstanding was 44 shares. These additional shares were in the name of officials of the railroad company but actually were the property of the railroad company (R., 1006). The only other stock voted at the said meeting in addition to the 3,800 shares was 12 shares, the other 32 not voting (R., 1008).

Subscribed stock of Railway could be voted whether paid for or not (R., 1109, Charter Section 9), or outstanding, but amendment of 1895 required it to be subscribed and outstanding and no business could be transacted unless a majority of subscribed and outstanding present.

After the meeting of June 26, 1873, there was no meeting of the directors or stockholders of the railway company, except a meeting of the directors on August 31, 1880, until October 18, 1895 (R., 1110).

In the meantime the railroad company had absorbed the railway company (R., 1135) and had built in its own name and on its own property the line of railroad from the Bay of Superior to Thompson's Junction as outlined in the contract with Walbridge Bros. & Sargent, as changed by the directors' meeting of June 26, 1873, so as to further locate the line along the Bay of Superior to Connor's Point, as provided in the contract with the railroad company (R., 1136-7-8) along the identical line located by the railway company (R., 1139-40).

The railway company reported on December 31, 1873, that there was built 15 3/5 miles in Wisconsin and 9 miles in Minnesota (R., 1132), and made the same report in December 13, 1874, both of which reports were false, as there was nothing done but some grading.

James Bardon, a director of the railway company, verified a statement in the Superior Times of September 4, 1880, that the charter of the railway had passed virtually into control of the railroad in 1873, and was reorgnaized for the benefit of the railroad and was essentially its line (R., 1133-4).

President Wright of the railway company (a director in 1870-1879, and president and director of the railroad

company) refused to turn in his stock and assent to the 1896 reorganization and directed his heirs not to dispose of it, as the stock would continue to have value and land value of which the so-called reorganization and fake foreclosure of 1896 could not divest it (R., 1134).

It is alleged: "The Wisconsin Special Statute of March 25, 1872, chapter 139, referring and applying to the Northern Pacific Railroad Company and the Federal Charter of the latter company, *authorized* this consolidation to be made, it aiding in the construction of the main line of railroad contemplated by Congress. Section 2 of this act is as follows:

'SECTION 2. A purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, *shall* for the purpose of this act, *be deemed equivalent* to a *construction* by said Northern Pacific *Railroad Company* of its said railroad, for such distance as the road so purchased or consolidated with shall be constructed on said route.'

"The 24 3/5 miles location of the railway company complied with the above route" (R., 1135).

Prior to January, 1873, the State of Wisconsin sued the railroad company to prevent it from cutting out Superior and putting Duluth on the main line; this suit was settled and compromised by agreement with Governor Washburn of Wisconsin in 1873, which is set out in the record (R., 1136), whereby the Northern Pacific Railroad Company agreed to build a branch from the main line on the Lake Superior and Mississippi Railroad from Duluth across Rice's Point and Connor's Point along the shore of the Bay of Superior to the Nemadji River, which the railroad built on the line that the railway had located (R., 1139-40).

Although the Douglas County bonds to the railway company had been cancelled and declared void, yet $50,000 of the bonds and other remuneration were allowed by the decree by consent to Walbridge Bros. & Sargent, but there was no order cancelling or mentioning the 3,800 shares of stock and they were left the property of the

railroad company (R., 1142) and by the Act of February 20, 1879, the $50,000 of bonds went to the railroad company as the builder of the line of railroad. (The Act is in the appendix, p. 5.)

After Section 2 quoted above and the contract with Governor Washburn, Douglas County donated certain lands to the railroad company for the construction of the 24 3/5 miles from Thompson's Junction to Superior, and 3 more miles to Connor's Point and to Rice's Point, and Congress approved the route and authorized the building of the necessary bridge by the railroad company by the Act of February 27, 1873 (17 Stat. 477: and in appendix, p. 1).

Hiram Hayes was secretary of the railway company from the beginning until February, possibly May, 1895 (R., 1111), and he was the paid attorney of the railroad company, his salary being increased to $200 per month Feb. 16, 1880 (R., 1110). He reported to President Cass of the railroad the suit to cancel the Douglas County bonds because issued without statutory authority, and suggested entering an appearance and a defense, as it was simply service by publication, but President Cass paid no attention to it and did not defend (R., 1142), because he knew of the absorption of the railway company by the railroad company and the taking over of the route of the railway company and the building thereon of the railroad by the railroad company and of the negotiations and agreements with Governor Washburn and Douglas County for the above mentioned $50,000 of bonds and the land, which was evidently in lieu of the original bonds.

It is alleged: "The item in the consolidated balance sheet of the railroad company filed by the receivers showing the condition of the trust estate October 31, 1893, was 'Sundry branch roads and surveys $263,441.05' included the railroad built by the railroad company under the contract with the railway company on the line located by the railway company from Thompson's Junction to Superior and Connor's Point" (R., 1138).

At a meeting held in October, 1880, at Superior ad-

dressed by Bardon, Shaw, Hayes, Gates and Seyer and other officials of the railway and railroad company, a resolution was passed as follows: "Resolved that we learn with great satisfaction of the efforts being made by the non-resident owners to secure a railroad for Superior, and that their action has our cordial approval, and that we promise them out hearty co-operation in their efforts looking to the end in view. Resolved, that we desire and are anxious to see the railroad line extended from the Nemadji River up along or near the westerly shore of the Bay of Superior to the northerly end of Connor's Point *on the line located by the Superior & St. Croix Company in 1873* and afterwards adopted by the Northern Pacific Company, and that owners of property to be directly benefited by such extension should be solicited at once for contributions to encourage the construction of same" (R., 1138).

Accordingly on October 16, 1880, Hayes and others sent out circular letters requesting such contributions to the Northern Pacific Railroad Company and numerous parties gave lands and money conditioned that the railroad company complete line from Thompson's Junction to Superior and Connor's Point by December 31, 1881; they are referred to as the agreements with the "Proprietors of Superior", and are now in possession of the railway company.

As alleged: "Hiram Hayes, secretary of the railway company, made an affidavit in the case of *Mylrea, Attorney General* vs. *Superior & St. Croix Railroad Company* in part as follows: 'That on or about the month of May, 1872, the said Walbridge Brothers and Sargent failed and stopped work on the construction of the proposed railroad, discharged their men and never afterwards resumed work' on their contract with the railway company, and the *affidavit shows that they had not built any road for the railway company.* The *annual report* of the railway company for the year ending December 31, *1872, did not report any road built or operated* (R., 1139).

"The railway company officials, or rather the inside officials, knew that the 24 3/5 miles from Thompson's-Junction to Superior and Connor's Point was built by the railroad company on the identical line or route located by the railway company, being the line or route on which the railroad company was to build the road for the railway

company, *but in 1896* they *secreted or hid* and *prevented* and have ever since prevented these *petitioners* and all others from *seeing the records* of the *railroad* company and the *railway* company on this matter, and having hidden, secreted and kept covered up the said records *in 1896* the said *railway company in July built 3 miles east from the Minnesota State line through Walbridge parallel to* and on the north of the *line built by the railroad company* in 1880 from Thompson's Junction to Superior and crossed it to the south at Walbridge. This *line* was *150* feet *from* the *center* of the *roadbed* of the *line* the *railroad* (company) built in 1880 or 1881 and the right of way of same was 100 or 200 feet on either side. This three miles stretch was built by the inside group of the railway company and railroad company in 1896 for the purpose of trying to make their illegal and unlawful reorganization and fake foreclosure valid and legal'' (R., 1139-40).

General Counsel Stetson, also a director, of the railway company, who helped handle all the proceedings in 1893-6, conceded in the Hoover case for the purposes of the case that the line built by the railroad company under the agreement with Douglas County was built by the railroad company upon the lines located in 1871 and 1873 by the railway company; but at a later date after Engineer Darling testified that he was unable to say whether the railroad had built on said identical line, Mr. Dunn, attorney for the railway withdrew the concession, but this was before Engineer Weeks of the railway and railroad company testified that he remembered that the route built by the railroad in 1880 and 1881 was the line located by the railway company in 1871 and 1873, and he remembered that they built right on the openings made some years prior thereto, which was the line located by the railway (R., 1140).

As alleged: ''The line built by the railroad company from Thompson's Junction to Superior and another piece built by the railroad to and along Connor's Point were both on the road or line located by the Superior & St. Croix Company, and these petitioners are informed, believe and charge that the lines so built from Thompson's Junction to Superior and Connor's Point on the line located by

the railway company and covered by the contract between between the railroad and railway companies was in May, 1882, by action of the board of directors of the railroad company, adopted as part of the main line of the railroad company'' (1141).

Johnston Livingston, stockholder and director of the railroad company in 1880 and 1881 and a director of the railway from then until 1896, testified in 1903 that he did not know that the Superior & St. Croix Railroad Company was the Northern Pacific Railway Company that in 1896 became a party to the so-called reorganization and foreclosure (R., 1142).

Stetson was attorney for Livingston in the consolidated suits, and Stetson stated in brief in Northern Pacific Securities case that the Railway Company was ''formed'' in 1896 (see below page 31).

''Because of and in view of the apparent ownership of the railway company by the railroad company in 1873 and all times thereafter and the building by the railroad of 24 3/5 miles from Thompson's Junction to Superior and Connor's Point on the identical line located by the railway company in 1871 and 1873, along which the railroad company was to build the railroad for the railway company, and the absorption of the railway company by the railroad company as hereinbefore in this paragraph set out, a paragraph was put in the *Voting Trust Agreement* of December 1, 1896, which provided:

'The term Northern Pacific Railway Company for the purposes of this agreement and for all rights thereunder including *the issue and delivery of stock* shall be taken to mean either the Wisconsin corporation of that name created by Chapter 326 of the Private and Local Laws of Wisconsin, passed 1870, and the Acts supplemental thereto, or any successor or consolidated *or other railroad corporation,* which with the unanimous approval of the voting trustees, *shall be adopted to own or operate* the railroad properties acquired under the said reorganization plan and agreement dated March 16, 1896, and to *carry said agreement into fuller effect.*' '' (R., 1143.)

J. P. Morgan, the dominating figure in the 1896 proceedings and one of the Voting Trustees, testified in 1903 that in *1896* the *purchaser* was the *''old company''*—the Northern Pacific Railroad Company (R., 1146).

There was no meeting of the stockholders or directors of the railway company from August 31, 1880, until October, 1895, but sometime prior to April 19, 1895, an application for the so-called amendment of the Superior & St. Croix Railroad Company charter, which the legislature passed April 19, 1895, was filed and it was claimed to have been made by Hiram Hayes, who was attorney for the railroad company as well as secretary of the railway company, but there is *no authority* therefor, as *Hayes did not prepare said application, had no knowledge of* the *preparation* and *did not see it until after its enactment.* It was prepared by John C. *Spooner,* who was *attorney* for the *railroad* company and the *receivers* of the railroad company, *Morgan* & Company, and for the *railway* company (R., 1111).

At a stockholders' meeting of the railway company on October 18, 1895, which sought to confirm the void and unconstitutional amended charter, and at the stockholders' meeting on July 1, 1896, the only shares present, being 43 which were the actual property of the railroad company, were voted by proxies by Spooner, Reed (Spooner's secretary) and Sanborn (Spooner's partner). The 3,800 shares of the stock in the railway owned by the railroad were not present or voted and no notice was given to the railroad company or to the receivers of the railroad company (R., 1110-11).

Hayes, by a letter with many false representations (R., 1113) had the First National Bank of Madison, Wisconsin, deliver to Sanborn the 3,800 shares of stock of the railway company, owned by the railroad company.

The said so-called amendment of April 19, 1895, was unconstitutional under Section 7 of the Constitution of Wisconsin of 1871, which prohibited the legislature from granting by special or private laws "corporate powers or privileges except for cities", because of the granting of an increase of powers, rights and functions denounced by the Supreme Court of Wisconsin (R., 1005-6-7, 1131).

Section 15 of the original charter had a capital stock

of $5,000,000, which might be increased not exceeding $10,000,000. This section in the amendment was repealed and Section 10 of the amendment amended Section 11 of the original charter permitting the stockholders to increase the stock without any limit on the amount. This is an unconstitutional grant (R., 1003-4).

The illegal and void meeting of the stockholders of July 1, 1896, with only 43 shares voting, as stated above, without any authority from the amendment, changed the name of the corporation from the Superior & St. Croix Railroad Company to the Northern Pacific Railway Company (R., 1008) and increased the capital to $155,000,000, divided into common and preferred stock (R., 1005) (R., 999, 1002, 1008).

The so-called amended charter changed the railway company from a local state railroad to an interstate railroad with claimed power to build a railway to the Pacific Ocean (R., 1007). This was such an increase of powers, rights and functions as was denounced by the State Supreme Court (R., 1005-7). There were other powers, rights and functions granted, included in this void amendment, which were unconstitutional.

The Wisconsin Supreme Court refrained from passing upon the validity of the Act of April 19, 1895, in the Mylrea case, 93 Wis. 604; 67 N. W. 1133 (R., 1000), which was a friendly suit to determine whether or not the charter of the railway company had been abandoned and we think the necessary implication from the whole opinion is that the Court would have held that the Act was invalid had it passed upon the question.

In this Mylrea case no question was raised about the failure to organize the railway company or the invalidity of the meetings on August 31, 1880, and October, 1895. Many meetings of the directors, which were held outside of Wisconsin, were invalid (R., 1006).

The Wisconsin Act of April 22, 1897, chapter 294, page 632 (R., 1103), (R., 1126-7) and of April 18, 1899, chapter 198, page 306 (R., 1129), are similarly invalid, unconstitu-

tional and void, as, while they purport to be general laws, they were merely an attempt to disguise an amendment to the charter of the railway company and their passage was obtained by the attorneys and officials of the railway company for the purpose of granting powers and rights to the railway company that were prohibited by the constitution to be granted to the railway company. They are an attempted unlawful evasion of the constitution, and they are also void and contrary to the Wisconsin constitution, Article 4, Section 18, which forbids any act containing two subjects (R., 1129-30).

William Nelson Cromwell, attorney for P. B. Winston, on August 16, 1893 (R., 1010-1058-1082), filed a stockholders' suit against the Northern Pacific Railroad Company in the Circuit Court of the United States for the Eastern District of Wisconsin, which Court, by the affirmative allegations of the bill, and no jurisdiction either of the subject matter of the suit or the person of the railroad company, as the railroad company did not own or have any lands or property within the Eastern District of Wisconsin and was not a resident thereof. The only lands and properties that the railroad company owned or had in the State of Wisconsin were in the Western District of Wisconsin (R., 1148).

William Nelson Cromwell was attorney for the Stockholders' Protective Committee, was attorney for Receivers Oakes, Payne and Rouse, attorney for Adams' Reorganization or Bondholders' Committee, and attorney for George R. Sheldon, who was a director of the railroad company, member of the Stockholders' Protective Committee and member of the firm of Sheldon & Co., for whom Cromwell filed the creditors' suit against the railroad company (R., 1082).

The Stockholders' Protective Committee was a self-constituted committee of directors of the railroad company consisting of Brayton Ives, August Belmont, George R. Sheldon, and Charlemagne Tower, who became members of the syndicate and their acts were never authorized

or approved by or with the consent of the stockholders nor were any of the reorganization plans or agreements authorized or approved by the stockholders of the railroad company (R., 1083).

The expenses of the Stockholders' Protective Committee were paid by J. P. Morgan & Company, representing the Syndicate and Reorganization Managers (R., 1182).

Cromwell was attorney for George R. Sheldon, who was a director of the company, a member of the Stockholders' Protective Committee and a member of the firm of W. C. Sheldon & Company, and Cromwell filed the creditors' suit in the name of W. C. Sheldon & Co. in the Circuit Court of the United States for the Eastern District of Wisconsin against the railroad company on..... ....., 1893 (R., 1147), which suit was entirely without jurisdiction of the subject matter or person, as was the Winston suit.

On October 18, 1893, the Farmers Loan & Trust Company filed in the same Court a foreclosure bill against the railroad company, which afterwards was consolidated with the above-mentioned suits and became known as the foreclosure proceedings of 1896 (R., 1010).

The bill states several defendants, citizens and residents of New York, and Trust Company, a New York corporation.

These bills show affirmatively that the Northern Pacific Railroad Company did not own any land or have any property in the Eastern District of Wisconsin nor were any of the lands subject to the mortgage sought to be enforced in the said Eastern District of Wisconsin.

The Winston & Company stockholders' suit and the Sheldon & Company creditors' suit were also filed in the Federal Circuit Courts in the States of Minnesota, Washington and the other states traversed by the Northern Pacific Railroad.

In the Wisconsin Court *receivers* were appointed and in the suit in the State of Washington the receivers were *removed* (69 Fed. 871), because the Wisconsin Court *ap-*

pointed them *without jurisdiction* of the *subject matter* or *person* of the corporation as shown in the affidavit of Brayton Ives, president (R., 1147).

The creditors' and stockholders' suits in Minnesota were dismissed for lack of jurisdiction (R., 1148).

The purpose of these suits in the different states was to stop and forestall Brayton Ives, as president, and his associates, from getting and taking over control of the board of directors and property of the railroad company, which they were just about to consummate (R., 1148).

The bondholders' reorganization agreement was executed February 19, 1894 (J. C. C., page 4880), and made a part of the reorganization agreement of 1896.

It is alleged in Paragraph LXIII of the cross-bill (R., 1015), which is adopted, referred to, and made a part of the intervening petition, as follows: "It was *never* the *intention* of the *officials* of the Northern Pacific *Railroad* Company and of the so-called Northern Pacific *Railway* Company to *make a bona fide sale,* of the *land, property* and *franchises* of the railroad company *in* the *1896* reorganization and foreclosure, as the reorganization agreement of March 16, 1896, * * * (J. C. C. 2846; Plaintiff's Exhibit M to the amended bill) * * * to which reference is made and it is made a part hereof, provided * * * that the old agreement of February 19, 1894, * * * was adopted into and made a part of the agreement of March 16, 1896, and it *provided* among other things, * * * that the reorganization managers could '*do whatever,* in the *judgment of the managers,* may be necessary to promote or to procure the sale as an entirety or the joint or separate sales of any lands, grants of land, property, or franchise herein concerned, wherever situated; *to adjourn any sale of any property or franchise,* or of any portion or lot thereof *at discretion;* to bid or to refrain from bidding at any sale, either public or private, either in separate lots or as a whole, for any property or franchises or any part thereof, whether or not owned, controlled or covered by any deposited security or by the bonds represented by any assenting certificate, including or excluding any particular rolling stock or other property, real or personal, and at, before, or after any sale to arrange and agree for the resale of any portion of the property which they may decide

to sell rather than to retain; to hold any property or franchises purchased by them, *either in their name or in the name of persons or corporations by them chosen for the purposes of this agreement,* and to apply any security embraced hereunder in satisfaction of any bid or toward obtaining funds for the satisfaction thereof; and the term property and franchise shall include any and all railroads, railroad and other transportation lines, branches, leaseholds, lands, rights in lands, mining rights, stocks, or other interests in corporations, in which the railroad company has any interest of any kind whatever, direct or indirect. The amount to be bid or paid by the managers for any property or franchises shall be absolutely discretionary with them; and in case of the sale to others of any property or franchises the managers may receive out of the proceeds of such sale or otherwise any dividend in any form accruing on any securities held by them.'

"At the invalid so-called meeting of the stockholders of the railway company on July 1, 1896, upon the motion of John C. Spooner, it was stated that (R., 1016): 'Whereas under the reorganization plan of March 16, 1896, *Morgan & Co. hold securities* of the Northern Pacific Railroad, which they propose to use in the purchase of the railroad, franchises, and property at the sales under the foreclosure decree or upon the request of the Northern Pacific Railway Co. in exchange for its capital stock and bonds to transfer the Northern Pacific Railroad securities to the Northern Pacific Railway Co. to enable the Northern Pacific Railway Co. to purchase at the foreclosure sale the rights, property and franchises of the Northern Pacific Railroad Co., it was resolved that the Northern Pacific Railway Co. *do enter into contracts* with J. P. *Morgan & Co. reorganization manager,* for the securities of the Northern Pacific Railroad and use these securities to purchase the railroad property and franchises of the Northern Pacific Railroad Co., and that the president and secretary of the company were authorized to attend the judicial sales and bid in the Northern Pacific Railroad property to the extent of the securities of the railroad company then controlled by the railway company, and in payment therefor to transfer and deliver any or all of the stocks, bonds, or other securities of the Northern Pacific Railroad Co.' (R., 1017).

"The above *contract* and proceedings and the contract of *July 13, 1896* (Plaintiff's Exhibit "N"), * * * between the railway company and Morgan and Co., in which it

was stated that the railway company intended to acquire the railroad company property and franchises, including the grant of the Northern Pacific Railroad Company under the said foreclosure decree, were *prior* to the *mock foreclosure sale''* (R., 1017-8).

Demurrers were filed by the railroad company in each of the suits and/or in the consolidated suit, but were never passed on (R., 1099) (R., 996) (R., 1082), as the attorneys knew that on an argument of same the suits would have to be dismissed for lack of jurisdiction of the subject matter or of the person of the railroad company.

The instigators of the so-called reorganization and of the so-called foreclosure bought off Brayton Ives, President, by taking him into the syndicate so as to get a big share of profits and of the $10 and $15 deposits per share made by assenting Railroad Company stockholders without putting up any money and Ives had the demurrers withdrawn and an answer filed for railroad company admitting all the allegations, and consenting to the proceedings and decrees of sales (R., 1082, 996); this was all done without approval of railroad company stockholders (R., ...).

Ives afterwards made oath that he could have prevented the foreclosure and not withdrawn the demurrers or filed the answers (R., ...).

On the petition of Salomon (R., 995), the *Court* specifically *refused* to *pass on* the question of *ultra vires* and *validity* of the *mortgages* and also *jurisdiction.*

As alleged (R., 995): ''The Court had previously, on April 27, 1896, in the so-called decree ordering a sale of the properties of the railroad company (which will hereinafter be shown as beyond the jurisdiction of the Court, *ultra vires* and invalid and void) reserved without passing upon the *ultra vires* and invalidity of these mortgages and also reserved without passing on the question of the jurisdiction of the Court in that cause, for the Court in the decree stated:

'XXIX. It is further adjudged, ordered and decreed that all questions not hereby disposed of, including the discharge of the receivers and the settlement of their ac-

counts, are hereby reserved for further adjudication' (R., 996).

"The *decrees* of April 27 and 28, 1896, directing sales and the decrees of July 27, 1896, confirming sales, *specifically in terms reserved* and *did not decide or dispose* of the petition pending then before the Court of the Wisconsin Central Railroad Company, Government's Exhibit 58, sub. 23, which is referred to and made a part hereof, which *specifically raised* the *jurisdiction* of the *Court* and the *validity* of the said last mentioned *six mortgages* (J. C. C. Pt. 3, pages 1408-9-11-32-33); that the said *questions* of the *jurisdiction* and *dealing* with the *validity* of the *mortgages were never determined* by the *Court* and *all* proceedings and *decrees* as to the foreclosure were by consent and *collusion* between the officials in charge and control of the railroad company and who were then, or shortly thereafter, became officials in control of the said railway company, and the bondholders and trustees, and the said *decrees* amounted to no more than *collusive agreements* which the *Court* had *no jurisdiction* or *authority to confirm,* all of which will be more fully set out hereinafter and much of which is set out in the Government's Exhibit 58, of which there are 53 sub-divisions or parts, which are referred to and made a part hereof" (R., 996, 1082, 1099).

In reading the record one is drawn to the irresistible conclusion that Judge Jenkins did not pass on any question, did not even read the decrees, and that his signature was merely a formality. The Commercial and Chronicle of May 2, 1896, stated that the *decrees* in the Northern Pacific *Railroad* Company and Reading Railroad Company suit were *signed* by the *Court* in the *exact words submitted* by *Morgan & Company.*

The so-called foreclosure decrees (J. C. C., P. 1392) illegally declared that the second mortgage was a lien on stocks and bonds that it was not a lien on (R., 1150).

The 30,000,000 acres of land west of the Missouri River (R., 1150) worth many millions of dollars, were decreed to be sold, contrary to the Joint Resolution of May 31, 1870, and also of the first section of the Act of Congress of March 1, 1893, (both of which are quoted at R., 1151).

The so-called decree of foreclosure contained this provision: "XXIV. It is further ordered, adjudged and decreed that the claims, issues and equities raised by the *Wisconsin Central Company and the Wisconsin Central Railroad Company* and the *Receivers thereof* be reserved for further consideration by the Court, and that the sale of the first parcel of said mortgages premises shall not affect such claims, issues and equities, and shall *be made subject to such further orders* or decrees as hereafter may be made by the Court in respect of all and singular such claims, issues and equities" (J. C. C., 1408).

* * * * *

"XXVI. * * * and also subject to the claims, issues and equities raised by the *Wisconsin Central Company, the Wisconsin Central Railroad Company, or the Receivers thereof,* as hereinbefore mentioned in paragraph XXIV.

"XXVII. It is further ordered, adjudged and decreed that the defendant, *the Northern Pacific Railroad Company,* at the time of the execution of any such deed or deeds of said Special Master, shall, *as a further assurance* to the grantee therein and to his successors and assigns, *execute its deed* or deeds or join with said Special Master in the execution of the deeds to be made by him, and shall thereby *convey* and *release* to such *grantee* or to his successors and assigns all of its *right, title and interest* in *such property* and *franchises so conveyed by said Special Master*" (J. C. C., 1409).

There is no allegation or anything in the entire record on which to base the above portion of Paragraph XXVII. It was absolutely beyond the jurisdiction of the Court and contrary to *Townsend* vs. *Northern Pacific.*

The advertisement under the decrees after certain description, stated that there would be sold "and all the lands, tenements and hereditaments acquired or appropriated for the purpose of a right of way for said main line and branch, and all the easements and appurtenances thereto belonging or in anywise appertaining and all the railways, ways and *rights of way, depot grounds,* tracks, bridges, viaducts, culverts, fences and other structures, wharves, docks, depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, warehouses, machine-shops, water-tanks, turn-tables, superstructures, erections and fixtures" (J. C. C., 1413).

The decree of confirmation (J. C. C., 1432) confirmed the sale, subject to all the terms, conditions, reservations and obligations in the decrees of sale, specifically mentioning the Wisconsin Central issue, and again (J. C. C., 1433) the decree "made it subject, however, to all equities reserved".

At the said sales the railway company bid $12,500,000 for property that it had agreed and admitted, and its *officials* had *sworn,* was of the *actual value of $345,000,000* as of March 16 and July 13, 1896, and President Ives testified that they were not permitted to bid over $12,500,000 because of the Wisconsin Central Railroad Company's attack on the validity of the foreclosure proceedings.

In the Winston suit in the District of Minnesota, in the sworn bill, "it was averred in connection with the land grant that if the lands could be taken into judicial custody 'the proceeds that will be received from such sales, together with the earnings of the defendant's railway system *will be more than sufficient to pay and discharge all of the defendant's obligations to its creditors, and preserve for its stockholders said railway system freed from debt'.*"

Morgan & Company, as the Reorganization Managers, became the stockholders of the railroad (except that held by the appellants and associates) and of the railway company and voted both stocks in fixing the *value* at *$345,000,000,* which was *more than $103,000,000* in *excess* of the *liabilities* and *capital* stock of the railway company. The *liabilities* were *$157,769,824.00* and the *stock* was *$84,205,446.00* (R., 1058-9). Morgan & Company as the Reorganization Managers appropriated all powers and functions of the committees and took over ownership and actual possession of the physical properties of the railroad.

The property under the so-called reorganization agreement of 1896 of the actual value of $345,000,000 was to be and was, transferred for the stocks and bonds of *some company "with or without foreclosure",* to be *either* the *railroad company* with Congressional approval and a new charter or some state company or a company to be char-

tered, but before the fake foreclosure the Superior and St. Croix Railroad Company's so-called charter was picked out and all the securities passed to it.

Twelve days after this transfer, the fake sale of $12,500,000 was carried out but the $345,000,000 of securities had been delivered and not just $12,500,000.

Later $18,000,000 of the stock of the railway company was returned to the railway company in addition to $12,036,800 (R., 1083) of stocks and bonds returned by Morgan & Company to the railway company (R., 1105).

Yet Stetson's letter of February 28, 1908 (R., 1102) stated that, "Proceeds of sale did not equal the indebtedness and the equity of the stockholders of the insolvent company (meaning the railroad company) was extinguished".

He also stated that the equity of the 7.3% bonds of 1870 were extinguished by the foreclosure in 1875; yet the railway company was carrying some of these bonds as assets (R., 1101).

The said reorganization plan of 1896 provided that it could be "with or without foreclosure".

Stetson in a brief in the Northern Securities case on behalf of Morgan stated (R., 1102): "The Northern Pacific *Railway* Company *was formed in 1896, upon* a *reorganization* of the Northern Pacific Railroad Company. Its capital stock consisted of $75,000,000 preferred stock and $80,000,000 common stock, and the *charter* provided that the preferred stock might be retired at par on any first day of January up to 1917."

As alleged (R., 1066): "In speaking, in 1903, of the agreement of July 13, 1896, Francis Lynde Stetson, general counsel and director of, and speaking for, the railway company, said that the railway company by amendment to its charter was authorized to purchase a railroad from Lake Superior to the Pacific Coast, that the only railroad answering that description was the Northern Pacific Railroad Company and that 'the *only way* of *acquiring* that *railroad* was by the *acquisition* of the *securities* then in the possession of the Reorganization Committee'." He thus admits it could not be acquired by purchase, or foreclosure, of the property, lands and assets.

In *United States* vs. *Northern Pacific Railway Company,* 256 U. S. 51, the bill alleged: "That the defendant, Northern Pacific Railway Company, is the assignee and successor in interest of the said Northern Pacific Railroad Company, to any and to all the properties, lands, rights, grants, privileges and franchises granted to said Northern Pacific Railroad Company by the Act of July 2, 1864, and by all acts supplemental thereto."

And the answer of the railway company admitted: "It is true that the Defendant is a corporation and is the *assignee* and *successor* in interest of the * * * etc."

The railway company is estopped to claim that they took title under the foreclosure or that the foreclosure proceedings were valid or passed any title, for the *railway company filed itself* and *had filed* for the *railroad company* an answer in *United States* vs. *Northern Pacific Railway Company,* 134 F. 715, the telegraph case, in which it is alleged among other things as follows:

"And these Defendants aver that the said Northern Pacific Railway Company never received any subsidy in land, bonds, or any loan of credit from the United States for the construction of any railroad or telegraph lines; that the said Northern Pacific Railway Company is not engaged in operating its said railroad or telegraph lines under any right or franchise derived from the Government of the United States or from any Act of Congress, but owns, operates and maintains the said line of railroad and telegraph under and by virtue of the laws of the State of Wisconsin, under which it was incorporated and organized, and the laws of the several States in which the lines of railway and telegraph are situate, and so these Defendants say that the said Northern Pacific Railway Company is not subject to the provisions of the said Act of Congress of August 7th, 1868" (R., 1106).

In the railway company answer in the Boyd case sworn to by Secretary Earl, June 26, 1907, it was stated (R., 1106-7: "That its capitalization was increased to $155,000,000 and that *duly and lawfully it did obtain,* and *does now hold,* a *majority* of the *outstanding* and issued *stock* of the Northern Pacific *Railroad Company,* and also substantially all of the franchises, property and assets which were formerly of the Northern Pacific Railroad Company,

except as from time to time portions of the land grant have been sold and disposed of."

In December, 1901, the railway company filed an answer in the case of *Hackett* vs. *Northern Pacific Railway Company,* in the Supreme Court of New York sworn to by George H. Earl, Secretary, in which it stated: "In July, 1896 this defendant—meaning the Superior & St. Croix Railroad that was—"at judicial sale purchased the railroad franchises, immunities and other property of the Northern Pacific Railroad Company, a corporation organized under the laws of the United States, *with the consent of the State of Wisconsin,* at a time when the respective railroads of this defendant and of the said Northern Pacific Railroad Company could be lawfully connected and operated together to constitute one continuous main line" (R., 1107).

Charles Donnelly, president of the railway company (formerly general counsel of the railway company) testifying before the Joint Congressional Committee, stated, seemingly in *contradiction* of the *Railway company's answer* in the case of *United States* vs. *Northern Pacific Railroad Company,* 134 F. 715 (above) (R., 1106), that the "obligations of the new company imposed by the original act, of course—the obligations imposed by the original act upon the old company do, of course, rest upon the new company. Whatever the old company had to do we had to do." (The old company was the railroad company, the new company the railway company) (R., 1156).

James S. Kerr, who was for many years attorney for the railway company and represented it before the Joint Congressional Committee (Part 2, (JCC p. 892)) in discussing *L. S. & M. R. R. Co.* vs. *U. S.,* 93 U. S. 442; 23 L. Ed. 965, admitted that under the *railroad company act* of July 2, 1864, the railroad became, in a sense, *an agency of the Government* and the Government reserved the right to amend the charter (R., 1157).

Kerr, testified in the hearings as follows:

"Senator Kendrick: Mr. Kerr, when those lands were sold under that foreclosure, where did the title to them then rest?

Mr. Kerr: In 1875?

Senator Kendrick: No; I mean in 1896.

Mr. Kerr: It rested in the purchaser, which was the *reorganization committee,* made up of the representatives of the holders of bonds and securities of the old Northern Pacific Railroad Co. They acquired title to them, and when the sale was affirmed, what they purchased at the foreclosure sale was conveyed to them, or assigned by them to the Northern Pacific Railway Co., and the special master and the receivers and the railroad company itself, under the direction of the court, made deeds to the Northern Pacific Railway Co., the Wisconsin corporation'' (R., 1161).

This evidences that there *were secret agreements, arrangements,* plans and *transactions* in *1896* in the so-called reorganization and fake foreclosure *that are still secreted, hidden and covered up by* the officials of the railway company and other parties thereto.

Attorneys advising him in *1896* told *Morgan* that the *1896 proceedings* were not legal or valid and *did not pass title,* but *Morgan instructed* them to *proceed* with the so-called reorganization plan and foreclosure and that *he* would *be responsible* for it and *protect everyone.* When it became necessary, he would *revamp* the *situation so* as to *make* it *legal.* In a nut shell, all the transactions of 1896 were nothing more or less than the *word and fiat of Morgan & Company* and were solely to get out a new lot of securities which could be marketed by *virtue* of the *Morgan name.* Therefore, *Morgan,* to *protect himself, had* the foregoing *reservations* put in the *Voting Trust* and the following reservations put in the *new mortgages.*

The nomination of Bryan at the convention that convened in Chicago July 7, 1896, possibly caused the Managers to rush into the contract, transfer and conveyances of July 13, 1896, and to get the so-called deal and foreclosure through and consummated before the election.

The Railroad Co. has held stockholders meetings annually from 1896 to 1938, attended by appellants or associates and our associates of appellants Charles Fearon made affidavit on January 28, 1932, at request of and on behalf of the United States filed in this suit and later on

April 21, 1932, testified both as witness before the Commission for the Government and the Railway Company in part as to the affidavit, the Reorganization of 1875 and the so-called Reorganization of 1896.

Geo. H. Earl, Secretary of the Railway Company, in 1903 said, "The matter (meaning satisfying or paying the non-assenting stockholders) should have been closed up long ago and would have been but for bad advice."

Earl had been an official of railroad company many years prior to 1896.

The two mortgages dated November 10, 1896 contained these provisions: "And whereas, prior to such sales and conveyances, and for the purpose of enabling the Railway Company, party of the first part hereto, to make payment for said railroad and telegraph lines, franchises, lands, land grants, rights to land, stock, bonds and other properties, and of procuring the execution and delivery of the bonds hereby secured, as hereinafter provided, and for other purposes, the *firm of J. P. Morgan & Co.,* of the City of New York, acting as *Reorganization Managers* under a certain Plan and Agreement dated March 16, 1896, for the Reorganization of the Northern Pacific Railroad Company, sold, transferred, and delivered to the Railway Company, party of the first part hereto, General First Mortgage Bonds, General Second Mortgage Bonds, General Third Mortgage Bonds and consolidated Mortgage Bonds of said Northern Pacific Railroad Company, together with certain other securities and property, *upon the express promise and agreement of the Railway Company,* among other things, to execute and deliver this mortgage or deed of trust, covering, as hereinafter set forth, the railroad and telegraph lines, property, franchises, lands, rights to lands, stocks and bonds acquired at said sales, and certain other properties now owned or hereafter to be acquired by the Railway Company, and to make, execute, deliver and use, as hereinafter provided, its bonds secured by this indenture;"

* * * * * *

ARTICLE TWELVE.

* * * * * *

"SEC. 4. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, *the terms* 'Railway Company' and 'North Pacific Railway Company' *include* and *mean not only* the party of the first part hereto, *but also* any such *successor corporation,* formed under the *laws* of the *United States* or of any State or States thereof. Every such successor railroad corporation shall possess and from time to time may exercise each and every right and power hereunder of the Northern Pacific Railway Company, in its name or otherwise.

"SEC. 5. Any act or proceeding by any term of this indenture or any bond or resolution herein recited, required or provided to be done or performed by any board or officer of the Railway Company, shall and may, in event of any change in its existence, be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time *be lawful sole successor of the Railway Company.*"

The paragraph from the Voting Trust Agreement is stronger than this. They were still hoping to have passed the Northern Pacific Railroad Company new charter then pending in Congress, which provided for the passing of title and all property and rights of property, assets, franchises, powers, and liabilities of the railroad company to the new corporation which was to be the railroad company reorganized (R., 1084-9).

As alleged: "These petitioners are informed, advised and charge that the *officials* and *directors* of the *railroad* and *railway* companies and other parties to the reorganization and the fake foreclosure of 1896, as various of them *stated at the time,* felt that the said so-called reorganization and fake foreclosure were or would be held and treated by the Courts as well as the United States to be invalid and void and that *no title* or right of possession *to any* of the *land, property,* stocks, assets, securities, or bonds had *passed from* the *railroad company,* and this *voting trust was organized* and the *above paragraph* (R., ...) *inserted* in it *enable* the *trustees* under the voting trust *to resume* the *conduct* of the *property under* the *name* and *charter* of the *railroad company without any further proceedings whatever;* this *Court can* now and it *is* its *duty* to *declare* and

decree that *title to* and *right* to *possession* of all the *lands, properties,* franchises, assets, stocks, bonds and securities of the *railroad company* unlawfully taken into custody and possession, as hereinbefore alleged, by the railway company and the voting trustees, was in 1896 and has been at all times and *still is in* the *railroad company* (R., 1144).

"Although the railway attorneys filed an answer for the railroad company disclaiming any interest, yet it has put evidence in the record in this cause showing so many of the illegalities and wrongs committed in 1896, that the Court cannot make a true, just, equitable and complete decision and decree without determining most, if not all, of the very questions raised in this petition and cross bill. The railway company having thus presented the matter, such determination is mandatorily required by the statute of June 25, 1929" (R., 1144).

The so-called Reorganization Agreement of 1896 provided that the stockholders of the railroad company should turn same in and deposit $15.00 for each share of common stock and $10.00 for each share of preferred stock to enable the holder to obtain a share of the railway company stock for each share so deposited. This was illegal and invalid and void and not enforceable and could not be required, as they falsely stated that the money was to be used for working capital for the railway company, whereas not one cent of it was to go to the railway company or the railroad company, but all of it went to the members of the syndicate. That such deposits did not go to the railway company was evident by that company's report to the State of Montana for and to July 13, 1896 (the date the securities were transferred) showing that its capital stock actually paid in money was $4,300 and that its only cash assets were $4,100.

The Wisconsin Statute, Section 1751, in force in 1896 prohibited such a transaction for the railway company stock, as it provided: "No corporation shall issue any stock or certificate of stock except in consideration of money or labor or property estimated at its true money value actually received by it equal to the par value thereof," etc.

"In the Syndicate contract of March 16, 1896, para-

graph 7, it is provided that the new stock is to be offered to the stockholders of the Northern *Pacific Company* whilst the assessments are to be paid by stockholders of the Northern Pacific *Railroad Company*'' (R., 1092).

''There is nothing in any of the agreements or negotiations to show who or what the *Northern Pacific Company* was or is. It is one phase of the transaction still secreted and covered up by the officials of the railway company as part of its illegal and unlawful scheme set out herein, and which petitioners after diligent efforts and research have not been able to discover and unravel (R., 1092).

''That the entire stock issued by the said Wisconsin corporation, known as the Northern Pacific Railway Company, is held and possessed by a Voting Trust organized in 1896'' (R., 1092).

As alleged: ''Under the 1896 plan the so-called deposit of $10 and $15 by railroad stockholders was not authorized or required by the Directors or stockholders of the railroad or railway companies or by a Court, but was required only by the Syndicate Members and the Managers, and the deposits went solely to the Syndicate Members for their expenses and profits, without any benefit or advantage to the creditors or stockholders of the railroad company or the railway company or to rehabilitate the railroad company; * * * '' (R., 1089).

The plan required the depositors thereunder to ''sell and assign their deposited stock to Morgan & Company, Reorganization Managers'' (R., 1103). This assignment was not to the railway company. The agreement required the managers to acquire all the outstanding stock and bonds and the syndicate getting the deposit was enabled to get new stock of the railway company of the par value of $27,788,800 for $4,030,285, or $23,758,515 less than par (R., 1092).

Morgan, as Reorganization Manager and a stockholder, agreed to acquire $9,100,000 non-assenting stock outstanding September 1, 1896, after the time the stockholders under the plan could deposit had expired (R., 1067). Instead of acquiring it and in place thereof, Morgan turned back to the railway company $18,000,000 of its stock and

$12,036,800 of stocks and bonds on April 29, 1897 (R., 1105).

Morgan & Company required the railway company to give them an indemnifying bond and relieve them of all liability, which the railway company did (R., 1077), and the railway company also assumed the liability of Morgan & Company (R., 1080).

Between September 1, 1896, and June 30, 1897 (R., 1070), the railway company took up 9,000 shares of the railroad company stock of the value of $900,000 and issued prior lien bonds in the amount of $996,000 "in exchange for property".

President Donnelly of the railway company testified before the J. C. C. that the stockholders of the railway company and the railroad company were substantially the same, and the holders of securities of the railway company and the railroad company were substantially the same (R., 1156).

In every annual meeting from 1898 to 1937 these appellants and those associated with them, non-assenting stockholders, have protested the 1896 so-called reorganization and so-called foreclosure and have urged redress therefrom. Copies of the resolution are in the record (R., 1045, 1047).

On November 20, 1900, Joseph Hoover, who was associated with these appellants, filed a suit in the Circuit (now the District) Court of the United States for the Southern District of New York against the railway and railroad companies, Morgan and the Voting Trustees, and others, attacking the said so-called reorganization and foreclosure (R., 1044), in which suit a great many depositions were taken and which is still pending and undetermined and it is alleged that the railway company never wanted it tried (R., 1051). There were many negotiations for settlement until after 1920.

Shortly after this Hoover suit was instituted Mr. John G. Johnson and Judge Joseph P. McCullen, attorneys for

the plaintiff, realized that they would never obtain all the facts and get all the relief until there was a Congressional investigation and an Act of Congress consenting that the United States be sued or be made a party to the suit, as its rights were so vitally affected in the transactions and property (R., 1051).

Mr. Johnson died April 14, 1917, and Judge McCullen died December 2, 1929, five months after the Act of June 25, 1929, passed.

The reservation keeping open the ownership of the properties in the Act of July 1, 1898, was due in part to the urgings and efforts of the appellants, their associates and attorneys, who were then seeking a Congressional investigation and Federal aid. These appellants, their associates and attorneys were continuous and persistent in such efforts annually until they obtained the Act of 1929.

Mr. Johnson and Judge McCullen were too good attorneys to permit their rights to be lost by laches.

Judge McCullen, counsel for the non-assenting stockholders, on March 20, 1908, addressed the Senate Pacific Railroad Committee urging passage of Senator Hepburn's pending resolution of February 6, 1908, providing for such Congressional investigation. (This address is published in J. C. C. 1645.)

This resolution is in Appendix, p. 14, and was favorably reported by the Senate Committee April 7, 1908, after cutting out the whereas clauses and the words "the matters herein referred to" and inserting in lieu of the latter the words "all matters relating to the reorganization of the Northern Pacific Railroad Company", and also omitting the word "so-called" in the third line below. A resolution of February 5, 1907, is in the appendix (p. 11).

The attorneys and appellants and associates vainly sought help from the railroad company for such an investigation and they persistently and continuously worked and fought for such an investigation and statute, and their efforts were crowned by the investigation held by the Joint

Congressional Committee, which resulted in the Act of June 25, 1929. But for the action and efforts of the appellants and associates and attorneys the investigation and statute would not have resulted (R.1944).

After the passage of the act and before the suit, the appellants, their associates and attorneys were conferring with and assisting and furnishing information to the Government attorneys and continued to do so after the institution of the suit.

On November 2, 1931, at the request of the Government attorneys, one of the minority stockholders, Charles Fearon, executed for the Government an affidavit which was filed in this suit and likewise another affidavit on January 28, 1932, and on April 21, 1932, Fearon was called and used as a witness, both by the Government and the railway too before the Special Master, testifying as to the Northern Pacific Railroad Company as reorganized in 1875, the stock of said corporation, the stock owned by the witness and others, as to whether or not any threats had been made against the railroad.

During all this period and at this time and until shortly before or after Mr. McGowan withdrew as attorney for the Government, the appellants, their associates and attorneys were led to believe that all rights of the minority stockholders and of the railroad company and all the matters before the Joint Congressional Investigating Committee, including the validity and foreclosure of the mortgages, would be heard and determined in this suit.

In 1896 and afterwards the railway company construed the transaction to be merely an exchange of securities, or a sale of the securities of one company for the securities of another company without any reliance on the so-called foreclosure; a party's construction of a contract when made is binding on him afterwards (R., 1104).

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON.

Each of the 34 assignments of error are relied upon and are discussed in the brief along with the 25 Points of law, and all are found in the record in order (R., 1217 to 1232-3-4), and in the Appendix in order (p. ....).

In the front of this brief each of the Points is set out verbatim, accompanied with a copy or reference to the assignments of error discussed with; the other assignments are referred to.

ARGUMENT.

POINT I.

The Act of June 25, 1929, is a mandate requiring a finding of fact and decision by the Courts of all those disputes mentioned in Section 5 and the Courts must determine them on the cross bill as well as the intervening petition.

This Point is considered in connection with the assignments of error XIX and XXII, which are as follows:

XIX.

The Court erred in its Decree of March 22nd, 1938, in denying on the merits, and not striking the Motion to Dismiss the Bill and (965) Amended Bill of Complaint, which Motion was filed by the Northern Pacific Railroad Company by Charles E. Schmidt and Minority Stockholders, March 17, 1938, and in not granting the Motion and giving leave to and requiring the plaintiff to file an Amended Bill putting in issue the validity of the foreclosure of the mortgages claimed to have been executed by the Railroad Company and the other matters required by the mandate of the Act of June 25, 1929, as set out in part in the said Motion, and as shown by the said Act.

XXII.

The Court erred in refusing to hold that as alleged in the answer and cross-bill and intervening petition, and admitted, that when Congress passed the Act of June 25, 1929, it made it mandatory on the Attorney General, and

the Court, to have determined in the suit under proper allegations in the bill of complaint, all the rights of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, as is shown by Chairman Colton's Report for the committee to the House, and as these matters were purposely left open for future determination by Act of July 1, 1898 (30 Stats. 620), and by the said Act Congress purposely agreed and gave its consent for the United States to be sued or to be a party to litigation between the Northern Pacific Railroad Company and the Northern Pacific Railway Company, as *Congress construed* the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, to make it *mandatory* that the *United States be a party to all suits* and litigations involving the land, land-grants and mortgages authorized thereunder, and that such rights could not be determined in any other litigation, as the United States could not be made a party to any other such litigation.

The Act of June 25, 1929, provides:

Sec. 5. The Attorney General is hereby authorized and *directed* forthwith to institute and *prosecute* such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said *companies,* and to have all said controversies and disputes respecting the *operation* and *effect* of said *grants,* and *actions taken* under them, judicially determined, * * * . In the *judicial proceedings* contemplated by this Act there *shall be presented,* and the court or *courts shall consider,* make findings relating to, and determine * * * including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, * * * the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or *any other proper person, shall be* entitled to have heard and determined by the court all questions of law and fact, and all *other claims* and matters which may be *germane* to a full and *complete adjudication* of the respective rights of the United States and said companies, or their successors

in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and *all other questions of law and fact presented* to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), *notwithstanding that such matters may not be specifically mentioned in this enactment.*

The hearings of the Joint Congressional Committee in 15 volumes consisting of more than 5,000 pages had evidence and contentions on all of the various questions and controversies as well as others set out in the cross-bill and answer of the Railroad Company by Minority stockholders and in the intervening petition of the appellants. Quotations from Committee report are in Appendix, p. 23.

With this point there will also be considered Assignments of Error Nos. 2 (R., 1217) and 3 (R., 1218) and 4 (R., 1218) (which are set out in the Appendix, p. 71).

The Special Master, in his first report (R., 1201) stated: The government neither by the Bill nor in argument is attempting to set aside the decrees of foreclosure or the sales had under those decrees."

In the face of that how can it be contended that the validity of the foreclosure was in issue before cross-bill filed?

As set out in the statement of the case the above matters required and directed by the statute have not been put in issue and while the court might not voluntarily as a matter of policy decide and determine such matters yet it is obligatory for the court to do so when Congress so directs.

The Courts have nothing to do with the policy of handling land grants or affecting land grants, railroads and other institutions but that is solely for Congress.

"This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done this, its duty ends." *U. S.* vs. *Butler,* 297 U. S. 1; 80 L. Ed. 477; 56 S. C. 312.

Congress can always call on the Courts and the executive officials for information and facts to assist it in future legislation.

The books are full of cases where Congress has required the Court of Claims to make findings of fact for the guidance of Congress in some particular matter especially relating to public lands and to the Indians. The Court in this cause has not made a finding of fact as required by the Act or by the Equity Rules. *Century Indemnity Company* vs. *Nelson,* 303 U. S. 213; 82 L. Ed. 535.

McLennan vs. *Wilbur,* 283 U. S. 414; 75 L. Ed. 1148, held that "Authorized and directed" in a statute to be mandatory and "authorized" alone in another section is not necessarily mandatory, but *Red Canyon Sheep Company* vs. *Ickes,* 98 F. (2d) 308; 68 Apps. D. C. ....; 66 W. L. R. 566, 568, held that "authorized" is mandatory in some statutes and cites several decisions.

The Ronde case, 7 F. (2d) at 981, quoted and followed *Supervisors* vs. *U. S.,* 4 Wall 435; 18 Fed. 419.

In *U. S.* vs. *Union Pac.,* 98 U. S. 569; 25 L. Ed. 143, the Statute provided that "The Attorney General shall cause a suit in equity to be instituted" and the Court, at p. 608, 152, said, "The proceeding is one which the Attorney General is *peremptorily* ordered to bring", and states he had no "discretion" in the matter.

(See further quotations from the opinion and copy of statute in Appendix, p. 65.)

Had the Act used the word "May" instead of "directed and authorised", it would still be mandatory under the settled rule in the Federal courts.

In *Supervisors Rock Island Company* vs. *United States, ex rel. State Bank,* 71 U. S. 435, 4 Wall. 435, 18 L. Ed. 419, the Court at 422 said and held: "That act declares that 'the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may,* if deemed advisable, levy a special tax'."

* * * * *

"The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language 'may, if deemed advisable', * * * which accompanies the grant of power and, as he contends, qualified it to the extent assumed in his argument.

"In *King* vs. *Inhab, of Derby,* Skin. 370, there was an indictment against 'divers inhabitants' for refusing to meet and make a rate to pay 'the constables tax'. The defendants moved to quash the indictment, 'because they are not compellable but the statute only says that they may, so that they have their election, and no coercion shall be'. The Court held that 'may' *in the case of a public officer,* is *tantamount* to *'shall',* and if *he does not* do it, he *shall* be *punished* upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt.

"In *Rex and Regina* vs. *Barlow,* 2 Salk. 609, there was an indictment upon the same statute, and the same objection was taken. The court said: 'When a statute directs the doing of *a thing for the sake of justice* or the public good, the word 'may' is the same as the word 'shall'; thus, 23 Hen. VI, says 'the sheriff may take bail'. This is construed he shall, for he is compellable to do so.'

"These are the earliest and leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the *settled law of both countries.*

"In *Mayor of N. Y.* vs. *Furze,* 3 Hill 614, and in *Mason* vs. *Fearson,* 9 How. 248, the words, *'it shall be lawful'* were held also to be *mandatory.* See *Atty. Gen.* vs. *Lock,* 3 Atk. 164; Blackwell's Case, 1 Vern. 152; Dwar. Stat. 712; *Malcom* vs. *Rogers,* 5 Cow. 188; *Newburg T. Co.* vs. *Miller,* 5 Johns. Ch. 113; *Js. of Clark Co. Ct.* vs. *T. Co.,* 11 B. Mon. 143; *Minor* vs. *Mech. Bank,* 1 Peters 64; *Com.* vs. *Johnson,* 2 Binn. 275; *Virginia* vs. *Justices,* 2 Va. Cas. 9; *Ohio ex rel.* vs. *Gov. Chase,* 5 Ohio St. 53; *Coy* vs. *Lyons,* 17 Iowa 1.

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or an equivalent language—whenever the public interest *or individual rights call for*

its exercise—the language used, though *permissive* in form, *is in fact peremptory. What they are empowered to do* for a *third person,* the *law requires shall* be done. The *power* is *given, not* for *their benefit, but* for *his.* It is placed with the depository to meet the demands of right and to prevent the failure of justice. It is given *as a remedy to those entitled* to invoke its aid and who would *otherwise be remediless.*

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty'."

POINT 2.

Any and all defenses or contentions of laches have been eliminated by the Act of June 25, 1929, as well as by the Act of July 1, 1898 (30 Stats. 620),

Assignment of Error X is considered with this point. (See Appendix.) The Act of July 1, 1898, recognized that there was a dispute and question as to the validity of 1896 so-called foreclosure and reorganization but Congress was not ready at that time to have the disputes determined and passed the said Act, leaving the matter open and reserving the right of all parties, but specifically refusing to recognize any rights of the railway company to the property.

At that time counsel for appellants and associates were seeking relief through Congress, and otherwise and the Act of 1898 is a result of their efforts and urgings. The said Act, so far as applicable, is as follows: "And provided further, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the

provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted." (30 Stats. 620.) See also Senate Resolutions Nos. 247 in 1907, and 93 in 1908, Appendix, pp. 11, 14.)

Congress did not direct the Court to find laches, but to make findings of fact, which are to aid Congress in future legislation.

When any dispute or controversy cannot be settled by litigation unless the United States is a party to such litigation, there is no such thing as laches chargeable to anyone until after the United States gives its consent to be made a party to such litigation.

U. S. vs. *Union Pacific R. R. Co.,* 98 U. S. 569; 25 L. Ed. 143, clearly sustains this point. Not only as to elimination of laches, but also multifariousness and kindred defenses, for there the Court, after setting out and discussing a somewhat similar, but not as complete, Act as the 1929 Act, said: "We are of opinion, therefore, that the Act under which this suit is brought was not intended to change the *substantial* rights of the parties to the suit which it authorized, and that it was intended to *provide* a *specific method of procedure,* which, by *removing restrictions* on the jurisdiction, processes and *pleading* in ordinary cases; would give a larger scope for the action of the court, and a more economical and *efficient remedy than existed before;* and that it is a valid and constitutional exercise of legislative power."

The *reservation* keeping open the ownership of the properties in the *Act of July 1, 1898,* was *due* in part to the *urgings* and *efforts* of the *appellants,* their *associates* and *attorneys,* who were then seeking a Congressional investigation and Federal aid. These appellants, their associates and attorneys were continuous and persistent in such efforts *annually* until they obtained the Act of 1929.

Fuller quotations from the decision, as to this point and sustaining in effect the right of the Union Pacific to file a cross-bill and as it failed to do so, the then right of innocent minority stockholders to do so, are in the Appendix (p. 65).

POINT 3.

Any and all defenses or contentions of laches have been eliminated by the continual protests and seeking of relief by appellants at every annual meeting of the railroad from 1898 to 1938 and by the Hoover suit filed in their behalf in 1900 and still pending and undetermined.

This point will be considered in connection with assignment of error XVIII (R., 1226) and XXI (R., 1228) which set out some of the facts and the others are found in the statement of the case above and in the record (R., 1044-5-6). These assignments are in the Appendix, pp. 77, 79.

Neither the Railway or Government moved to dismiss the Cross-bill, because they knew under *Southern Pacific* vs. *Bogert,* laches are not applicable to present allegations, but the Court raised the question itself, and then stated the Court did not think Congress meant for that Court to do so much work. Maybe the work involved influenced the Court as much or more than laches. Anyway, had the Court given some study to the matter it would have soon discovered that there is no merit in the defense of laches to the Petition or Cross-bill.

The United States Supreme Court, in *Southern Pacific Co.* vs. *Bogert,* 250 U. S. 483; 63 L. Ed. 1099, found and determined as follows:

"First. The Southern Pacific contends that plaintiffs are barred by laches. The reorganization agreement is dated *December 20, 1887;* the *decree* of foreclosure and *sale* was entered May 4, *1888;* the *sale* was held September 8, *1888;* and the *stock* in the *new* company was delivered to the Southern Pacific on February 10, *1891. This suit was* not begun until July 26, *1913;* and *not until that time* was there a *proper attempt* to *assert* the specific *equity here enforced;* namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. More than *twenty-two years* had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of time. *It is essential that there be also acquiescence in the alleged wrong, or lack of diligence in seeking a remedy.* Here plaintiffs, or others representing them, protested as soon as

the terms of the reorganization agreements were announced; and ever since, they have with rare pertinacity, and undaunted by failure, persisted in the *diligent pursuit of a remedy,* as the schedule of the earlier litigation referred to in the margin demonstrates. Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf not only of the plaintiff, but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. *Cox* vs. *Stokes,* 156 N. Y. 491, 511, 51 N. E. 316. *Nor does failure, long continued, to discover the appropriate remedy, though well known, establish* laches *where* there has been *due diligence* and, as the lower courts have here found, the defendant was not prejudiced by the delay."

* * * * *

"Because of such wide divergence the earlier decrees do not operate as *res judicata. And there is no basis for the claim of estoppel by election;* nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis. *William W. Bierce* vs. *Hutchins,* 205 U. S. 340, 347, 51 L. Ed. 828, 833, 27 Sup. Ct. Rep. 524."

* * * * *

"Third. The Southern Pacific challenges the claim for relief on the ground that it took the new Houston Company stock, not as majority stockholder, but as underwriter or banker under the reorganization agreement. The essential facts are these: While dominating the old company through control of a majority of its stock, the Southern Pacific entered into its reorganization, under an agreement by which the minority stockholders of the old company could obtain stock in the new only upon payment in cash of a prohibitive assessment of $71.40 per share (said to be required to satisfy the floating debt and reorganization expenses and charges), while the Southern Pacific was enabled to acquire all the stock in the new company upon paying an assessment of $26 per share (said to be the amount required to satisfy reorganization expenses and charges). The Southern Pacific asserts that, unlike the minority stockholders, it assumed an underwriter's obligation to take the new company's stock not subscribed for by the minority, and also guaranteed part of the principal

and all of the interest on the new company's bonds which were given in exchange for those of the old company. But the purpose of the Southern Pacific in assuming these obligations was in no sense to perform the function of banker. It was to secure the incorporation of the Houston Railroad into its own transcontinental system. *And it was never called upon to pay anything under its guaranty.*"

See other quotations from this case under Point 25.

In *Hanchett* vs. *Blair,* 100 Fed. 817 (C. C. A. 9), at 827, the Court said: "The reasoning upon the question of limitations may be said to apply to the defense of staleness of complainant's cause of action,—not with regard to the period of time elapsing, but to the equitable considerations involved. It has been repeatedly stated by the Federal authorities that: 'Laches does not, like limitation, grow out of the mere passing of time. It is founded upon the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or parties.' *Galliher* vs. *Cadwell,* 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738. 'The length of time during which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations; and the lapse of time must be so great, and the relations of the defendant to these rights such, that it would be inequitable to permit the plaintiff now to assert them.' *Alsop* vs. *Riker,* 155 U. S. 461, 15 Sup. Ct. 167, 39 L. Ed. 223."

"This inequity has been often held to arise from changed value of property during the time elapsing from the date of the transactions which are the subject of the suit, or from the changed relations of the parties to the property,—as when a sale has taken place, and new rights have arisen. *Hubbard* vs. *Trust Co.,* 30 C. C. A. 520, 528, 87 Fed. 51; *Bartlett* vs. *Ambrose,* 24 C. C. A. 397, 399, 78 Fed. 839. The *present case* is *not one* of the class *where* the *value* of the *property has risen greatly,* or even perceptibly, *while the complainant remained in repose; nor is it one where new rights have arisen,* as it has not been proven that a sale has taken place to the defendant Hanchett. Each case of laches depends upon its own circumstances, and in the case at bar the *complainant's inaction does not appear to have worked injury to anyone; nor is*

it shown that there was any occasion for more promptly asserting his rights."

In *Saxlehner* vs. *Siegel-Cooper Co.,* 179 U. S. 19, at 39, 40, 45 L. Ed. 60 at 76, the court held and said: "But in cases of actual fraud, as we have repeatedly held, notably in the recent case of *McIntire* vs. *Pryor,* 173 U. S. 38, 43 L. Ed. 606, 19 Sup. Ct. Rep. 352, the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle that, where actual fraud is proved the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud like this, *we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."*

* * *

"So far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

POINT 4.

The Government is estopped to assert laches as the Attorney General violated the mandate of said Act requiring him to present, prosecute and obtain findings of facts and determination by the Courts of the disputes and questions enumerated in Section 5 of said Act.

This Point is considered in connection with assignment of error XX as follows:

The court erred in holding that the United States was not estopped to object to or oppose the answer and cross-bill and the motion to amend same, or the intervening petition, or to move to strike or dismiss either because the Attorney General failed to put in issue or prosecute to determination the validity of the two foreclosures of the mortgages and the disputes set out in the last clause of Section 5 in the Act of June 25, 1929 (46 Stats. 41).

The reasons and decisions set out under Points 1, 2 and 3 above would seem to be all that is necessary to be said in support of this point and assignment.

The Decision in *Southern Pacific* vs. *Bogert* under Point 3 above removed all questions of laches, multifariousness and other remedial matters. (See further quotations and Point 25, p. 139.)

The decision in *U. S.* vs. *Union Pacific* under Point 1, above fully sustains this Point under the facts alleged, and, as not denied are admitted. (See further quotation in Appendix, p. 65.)

After the passage of the act and before the suit, the appellants, their associates and attorneys were conferring with and assisting and furnishing information to the Government attorneys and continued to do so after the institution of the suit.

On November 2, 1931, at the request of the Government attorneys, one of the minority stockholders, Charles Fearon, executed for the Government an affidavit which was filed in this suit and likewise another affidavit on January 28, 1932, and on April 21, 1932. Fearon was called and used as a witness, both by the Government and the railway Co. before the Special Master, testifying as to the Northern Pacific Railroad Company as reorganized in 1875, the stock of said corporation, the stock owned by the witness and others, as to whether or not any threats had been made against the railroad.

During all this period and at this time and until shortly before or after Mr. McGowan withdrew as attorney for the Government, the appellants, their associates and attorneys were led to believe that all rights of the minority stockholders and of the railroad company and all the matters before the Joint Congressional Investigating Committee, including the validity and foreclosure of the mortgages, would be heard and determined in this suit.

POINT 5.

The railway company and other appellees are estopped by delaying their motions and joinder of issue in this cause for 5½ years, and 8 years after the suit was filed agreeing to amendment of the bill.

POINT 6.

Referring the pleadings to a Master before the sufficiency of the Bill is determined by the Court is reversible error.

These two points 5 and 6 will be considered in connection with assignment of error I (R., 1217) and XXIII (R., 1230) which are as follows:

I.

The Court erred in the Decree of May 24, 1932, by referring this cause on a Motion of the Railway Company and others (to which Motion the Railroad Company was not a party, though the Decree by mistake states it was on the Motion of the Northern Pacific Railroad Company) to the Special Master on the pleas, motions to dismiss and other pleadings as such reference was in violation of equity rule 59 as construed by *In re* Parker 283 Fed. 404 at 408, (4) III. (C. C. A.-7), which reversed and cancelled such a reference; *In re* King, 179 Fed. 694 (C. C. A.-7), and *In re* Bartleson Co., 243 Fed. 1001 (D. C. F. la.), and as this decree was sustained by the decrees of October 3, 1935, as amended by the Decree of January 29, 1936, affirming the report of the Special Master under the decree of May 24, 1932, the court again erred (958).

XXIII.

The Court erred in holding that it is now too late for the answer and Cross-Bill and Intervening Petition to be filed in this cause, notwithstanding it took the court, and parties, five years, six months and twenty-eight days from July 31, 1930, to January 29, 1936, to settle the pleadings, at a cost considerably in excess of $25,000.00, on January 29th, 1936, and until that time the minority stockholders (967) did not definitely know, and could not know, that the Attorney General, in dereliction of his duty, and the Mandate of Congress to him and the court, would ignore the mandatory direction of the Court requiring him to have all rights of the Northern Pacific Railroad Company and

Northern Pacific Railway Company to the land, land grants and properties, and the validity of the foreclosure of the mortgages in 1875 and 1896 determined, and further, notwithstanding that the Northern Pacific Railway Company is now in this suit trying to illegally and unlawfully grab, take, seize and possess further and other lands, or their value of the Northern Pacific Railroad Company, while the Northern Pacific Railway Company holds the Northern Pacific Railroad Company in captivity.

Assignment of Error XXI will be considered with this Point (See Appendix, p. 79 and R., 1228).

That Intervention herein is timely, under *Chicago, M. & St. P.* vs. *U. S.*, 159 U. S. 372; 40 L. Ed. 185, where the Milwaukee Company filed its cross bill and the Court said: "Such a cross bill was filed before the entry in the court below of a final decree on the original bill, and the cause was left undetermined as to the claims asserted by the Milwaukee company in its cross bill.

Benjamin Olson, Peter Anderson, and others, parties defendant in the original suit, intervened, with leave of the court, as defendants, and, by a cross bill against the Milwaukee company and the Sioux City company, asserted rights to portions of the lands in controversy—having settled, they alleged, on such lands, under the law of the United States, between the years 1881 and 1887, and made valuable improvements thereon.

The United States answered the cross bill of the Milwaukee company, and also filed an amended bill, in which it prayed that, by final decree, its title to the lands awarded to it by the original decree as against the Sioux City company, be established and quieted as against the Milwaukee company."

The Railway Company by seeking and obtaining the illegal reference in 1932 has entailed on the properties which belong to the Railroad Company a charge of $25,000. for Master's fee and other costs.

When the properties are delivered to the Railroad Company by this Court it will pay its share of proper fees and costs for the Master and for other purposes but costs of the first reference are not proper and cannot justly be assessed against the Railroad Company.

After the passage of the act and before the suit, the appellants, their associates and attorneys were conferring with and assisting and furnishing information to the Government attorneys and continued to do so after the institution of the suit.

On November 2, 1931, at the request of the Government attorneys, one of the minority stockholders, Charles Fearon, executed for the Government an affidavit which was filed in this suit and likewise another affidavit on January 28, 1932, and on April 21, 1932, Fearon was called and used as a witness, both by the Government and the Railway Co. before the Special Master, testifying as to the Northern Pacific Railroad Company as reorganized in 1875, the stock of said corporation, the stock owned by the witness and others, as to whether or not any threats had been made against the railroad.

During all this period and at this time and until shortly before or after Mr. McGowan withdrew as attorney for the Government, the appellants, their associates and attorneys were led to believe that all rights of the minority stockholders and of the railroad company and all the matters before the Joint Congressional Investigating Committee, including the validity and foreclosure of the mortgages, would be heard and determined in this suit.

This estops everyone from asserting that the cross bill or Intervening Petition should have been filed earlier or is too late now.

On April 11, 1938, appellants' counsel made formal demand on the Attorney General to rectify the Bill and Amended Bill of Complaint to comply with the mandate of the suit (R., 1260).

On April 16, 1938, the Attorney General replied to the demand, and without hinting or suggesting that we were too late with the Cross-bill and Answer and Intervening Petition, or with the demand that the bill be rectified, he stated that he thought that the bill complied with the Act of June 25, 1929 (R., 1262).

Certainly the Attorney General after such statement

that the bill does put in issue all the matters and controversies required by the Act, cannot now object to the Court determining such issues and controversies and making findings of fact thereon and determinations thereof, for if they were put in issue in the bill they have been there all the time since the bill was filed eight years ago.

On August 1, 1938, the Government filed an amendment to this Amended Bill (R., 1251) and still assumed that the Railway Company was the owner of the properties which amendment these appellants and also the Northern Pacific Railroad Company by Schmidt and others minority stockholders moved to strike out and the Northern Pacific Railroad Company by Schmidt and others minority stockholders also filed an Answer and Cross-bill to the said amendment and amended bill, and a motion to dismiss the amended bill with the amendment and reserving the motion to strike out (R., 1240).

ASSIGNMENT OF ERROR I.

"The Court Erred in Denying Leave to File the Intervening Petition of These Petitioners Filed on January 31, 1938, as the Said Petition Stated a Good Cause of Action is Timely and Sought Relief and Prevention of Delivery to the Northern Pacific Railway Company, of Lands or Other Value, Which the Said Northern Pacific Railroad Company Had Not Taken Possession of, But Which it is Seeking in This Suit" (R., 1234).

With this Assignment of Error I there will be considered the assignments of error X and XI found in Appendix (pp. 73, 74), which were field by the Northern Pacific Railroad Co., by Schmidt, &c., Minority stockholders, and are appropriate when considering its pending application for appeal found in Appendix (pp. 16 to 38).

In *Pearsall* vs. *Great Northern,* 161 U. S. 846; 40 L. Ed. 383, a suit was sustained and relief granted where the suit was brought by one stockholder for himself and other

stockholders against the Corporation to cancel rights under an illegal contract that had been *actually* signed and was *ultra vires;* neither the United States or the State of Minnesota.

Washington vs. *U. S.,* 87 F. (2d) 421 at 431-4, (C. C. A.—9), which is quoted and discussed with other cases in Modified Reply Brief in Appendix (p. 16), is a strong leading case and seems conclusive of appellants' right to intervene. This case was followed and approved in *Carroll* vs. *N. Y. Life Ins. Co.,* 94 F. (2d) 333 (C. C. A.—8).

Becker-Brooks Co. vs. *N. P. Ry. Co.,* 21 F. (2d) 4 (C. C. A.—8), sustained suit by minority stockholders brought for the Corporation and the N. P. Ry. Co., these as here was majority stockholders following similar tactics which were overruled.

Leary vs. *U. S.,* 224 U. S. 567; 56 L. Ed. 889 (cited above), granted Intervention after all the evidence had been taken in a suit by the United States; it held Petitioner not guilty of laches, and if, his Petition was not sufficient (but Supreme Court held it good) his request to Amend should have been granted.

In *Carter* vs. *Carter Coal Company,* 298 U. S. 228 at 286; 80 L. Ed. 1160 at 1177, the Court held and said: "The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in *Ashwander* vs. *Tennessee Valley Authority,* 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (February 17, 1936, and *requires no further discussion.*"

This case foreclosed the question.

In *Arn* vs. *Bradshaw Oil and Gas Co., et al.,* 93 F. (2d) 728 (C. C. A.—5), a suit by stockholders of a corporation for themselves and other stockholders the court held and said, "we think the suit, brought as it was, for the benefit of the corporation, *must* under the facts pleaded, *be regarded as brought by the corporation* and for the protection of its interests in the property in suit."

In October term 1933, *First National Bank* vs. *Flershem,* a corporation reorganization case, 290 U. S. 509, 78

L. 465, 477, the court used language as follows: "But that decree should have been without prejudice to her right to prosecute *her* claim against the Corporation, the assets in the hands of the receivers and the new company. To this end she should be given leave to *intervene* in the receivership suit and there present her claim for such relief as may appear to be appropriate. As the new corporation became party to the suit when it applied for confirmation of the sale, there is here no obstacle to this procedure. Compare *National Surety Co.* vs. *Coriell,* 289 U. S. 426, 438, 77 L. Ed. 1300, 1307, 53 S. Ct. 678, 88 A. L. R. 1231; *Kneeland* vs. *American Loan & T. Co.,* 136 U. S. 89, 34 L. Ed. 379, 10 S. Ct. 950."

Stockholders for the benefit of the corporation and other stockholders have maintained suits, or been allowed to intervene for such purpose in the following cases: *Farmers' Loan and Trust Company* vs. *N. Y. and N. Ry. Co.,* 44 N. E. 1043, 150 N. Y. 410; *Gamble* vs. *Water Company,* 123 N. Y. 91:25 N. E. 201; *Ponder* vs. *Railroad Co.,* 72 How. 385, 389; 25 N. Y. Supp. 560; *Barr* vs. *Railroad Co.,* 96 N. Y. 444; *Sage* vs. *Culver,* 147 N. Y. 241; 41 N. E. 513 *Meyer* vs. *Ry. Co.,* 7 N. Y. St. Rep. 245; *Ervin* vs. *Navigation Co.,* 27 Fed. 630 (. . . .); *Arn* vs. *Bradshaw Oil and Gas Co.,* 93 F. (2d) 728 (C. C. A.—5); *S. P.* vs. *Bogut,* 250 U. S. 463; 63 L. Ed. 1099; *Bierce* vs. *Hutchins,* 205 U. S. 340, 347; 51 L. Ed. 828, 833. An applicable class suit to enforce a Trust is *Thompson* vs. *Deal,* 67 Apps. D. C., 327: 92 F. (2d) 478, quoted under Point 25 citing and quoting from *U. S.* vs. *Butler,* 297 U. S. 1: 80 L. Ed. 477.

In *United States* vs. *California Co-operative Canneries,* 279 U. S. at 556; 73 L. Ed. 841, the Court held and said: "It did not refer to the decisions which hold that an order denying leave to intervene is not appealable, (citations) except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit, (Compare *French* vs. *Copen,* 105 U. S. 509, 524-526, 26 L. Ed. 956, 957; *Smith* vs. *Gale,* 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 614; *Leary* vs. *United States,* 224 U. S. 567, 56 L. Ed. 889, 32 Sup. Ct. Rep. 599; *Swift* vs. *Black Panther Oil & Gas Co.,* 156 C. C. A. 448, 244 Fed. 20, 30.)"

In *Credits Commutation Co.* vs. *United States,* 177 U. S. at 315, 44 L. Ed. at 785, the Court stated and held: "It is doubtless true that cases may arise where the denial of a right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by interventions."

This case was cited and approved in the following cases: *Illinois Steel Co.* vs. *Ramsey,* 176 Fed. 853 at 863, 100 C. C. A.—8 323, and *Western Union Telegraph Co.* vs. *United States and Mexican Trust Co.,* 221 Fed. 552, 137 C. C. A.—8 113, both holding claimant of lien on specific property in exclusive control of court has right to intervent and denial of petition therefor is reviewable; *Central Trust Co.* vs. *Chicago, etc., R. Co.,* 218 Fed. 336 at 339, 134 C. C. A.—2, 144, orders denying entervention of non-depositing bondholders in proceedings to foreclose mortgage on railway stock, which disposed of petitioner's claims, are final and appealable. In the instant case the non-depositing minority stockholders are attacking same after sale and under a special statute giving such authority, appellants having alleged and shown by exhibits that the sale was void and there was only an exchange of stock.

United States vs. *Northwestern Development Co.,* 203 Fed. 960 at 962, 122 C. C. A.—9 262, where petition in intervention was dismissed in final judgment in an action at law as not stating cause of action, judgment was reviewable on writ of error; *United States Trust Co.* vs. *Chicago, etc., R. Co.,* 188 Fed. 292 at 296, 110 C. C. A.—7 270, order denying petition to intervene where intervention was matter of right, held reviewable. This case cites *Minot* vs. *Martin,* 95 Fed. 734 (C. C. A.—8.)

POINT 7.

The Northern Pacific Railroad Company was prohibited by the Act of July 2, 1864, from issuing any mortgage or bonds and the Joint Resolution of May 31, 1870, was not a grant but only an exception to the prohibition, and this exception restricted the railroad company to the issuance and execution of one mortgage

and bonds thereunder, and such mortgage could not be a lien on the roadbed or right of way.

Assignment of Error III, IX, XVI, will be considered under this Point and as in Appendix, pp. 71, 73, 76.

The Act provides:

Section 10: "* * * and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States."

The joint resolution provides: "* * * authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and right of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior".

This requirement of recording the mortgage in the Interior Department indicates that it was restricted to the land which could be resold and of which the Interior Department had supervision and control and did not include the right of way and roadbed of which the Interior Department had no supervision or control.

There was no requirement for the recording of the mortgage among the land records of the various counties and states tranversed by the railroad company; Congress and the railroad officials both construed the Act as not including the right of way and roadbed under the lien of the mortgage as Congress did not require recordation in the counties and states as public notice thereof and the railroad officials and attorneys did not record the mortgage in any of the counties or states.

There was *no* provision to *repeal* the Joint Resolution —only to *alter* or *amend*—by Section 2.

The Joint Resolution was not an amendment of the Act of July 2, 1864, and the prohibition in Section 10 of the Act against mortgages was not amended or changed but Congress *authorized* and consented to the *one mortgage*

on its *"property"*, etc., by the Joint Resolution as provided for in the last clause of the prohibition but this mortgage could not cover the *"road"*.

The Act of Congress of July 2, 1864, and the Joint Resolution of May 31, 1870, not only did not give authority to sell but in terms and effect prohibited any sale of the lands and property of the railroad company in foreclosure under the one and only mortgage permitted by the act and resolution, except the lands beyond the right of way, which the act specifically provided for the sale of; this prohibition was for the purpose of preventing the right of way and the properties thereon, with necessary assets and franchises for the operation of same, from passing beyond the control of Congress by the right to amend and thus securing to the United States perpetually an ability to enforce its right for the transportation of the mail and troops and other privileges reserved to the United States under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870; in *Northern Pacific Railway Co.* vs. *Townsend,* 190 U. S. 267; 47 L. Ed. 1044, the Court held that the right of way of the Northern Pacific Railroad Company could not be sold and conveyed by the railroad company, and in *California* vs. *Central Pacific Railroad Company and others,* 127 U. S. 1; 32 L. Ed. 150, the Supreme Court held that a state could not tax a franchise of different railroad companies granted by Congress without the consent of Congress, and the Court found as a fact and stated, "That to facilitate the construction of said road the Government of the United States by said act of Congress adopted the defendant as the instrument or agent of the United States."

Section 10 of the Act of July 2, 1864, incorporating the railroad company provides "and (*a*) *no mortgage* or construction bond shall ever be issued by the said company *on said road* or (*b*) mortgage or lien made in any way except by the consent of the Congress of the United States. (*a* and *b* inserted.)

The (a) clause of Section 10 of the Act of 1864 was an absolute prohibition against a lien or mortgage on its

"*road*" which clearly means its right of way, roads, depots, &c., and the Joint Resolution was not an amendment of that clause nor did it refer to it or relieve from the prohibition thereof, for it was only the consent and authority of Congress under the (b) clause for a lien or mortgage on the land and rights of land.

The Joint Resolution uses words in the singular and it is not necessary to apply them to things in the plural to carry out the intent of the statute as the clear intent of the statute was only to provide for one mortgage sufficient to aid in the construction and equipment of the road as it was then figured $50,000. per mile for 2,500 miles or $125,000,000 which was the actual cost of construction on completion (*First National Bank* vs. *Missouri,* 263 U. S. 640; 68 L. Ed. 486).

The extent of the power of the railroad company is to be measured by the terms of the Federal statute relating to the railroad company and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business which they establish, but an incidental power can avail neither to creat powers which expressly or by reasonable implication are withheld nor to enlarge powers given but only to carry into effect those powers which are granted (*First National Bank* vs. *Missouri*).

"That the enumeration of these powers implies the exclusion of *all others*" *Pullman Co.* vs. *C. T. Co.,* 139 U. S. 24, 35 L. Ed. at 68 (quoted further under Point 10).

In *First National Bank* vs. *Missouri,* 263 U. S. 640; 68 L. Ed. 486, the Court said: "Does it conflict with the laws of the United States? In our opinion, it does not. *The extent of the powers* of national banks is to be *measured by the terms of the Federal statutes* relating to such associations, and they can *rightfully exercise only* such as are *expressly granted, or such incidental powers* as are *necessary to carry on the business* for which they are *established. Bullard* vs. *National Eagle Bank,* 18 Wall. 589, 593, 21 L. Ed. 923, 925; *Logan County Bank* vs. *Townsend,* 139 U. S. 67, 73, 35 L. Ed. 107, 110, 11 Sup. Ct. Rep. 496; *California Nat. Bank* vs. *Kennedy,* 167 U. S. 362, 366, 42 L. Ed. 198,

200, 17 Sup. Ct. Rep. 831. Among other things the Federal law (Rev. Stat. sec. 5154, Comp. Stat. Sec. 9694, 6 Fed. Stat. Anno. 2d Ed. p. 713), provides that the organization certificate of the association shall specifically state "the place where its operations of discount and deposit are to be carried on, designating the state, territory or district and the particular county, city, town or village." By another provision (Rev. Stat. sec. 5190, Comp. Stat. sec. 9744, 6 Fed. Stat. 2d Ed. p. 740), it is required that "the *usual business* of each national banking association *shall be transacted at an office or banking house located in the place specified* in its organization certificate." *Strictly,* the latter provision employing, as it does, the *article "an"* to *qualify words* in the *singular number,* would confine the association to one office or banking house. We are asked, however, to construe it otherwise in view of the rule that *"words importing the singular number may extend and be applied to several persons or things."* Rev. Stat. sec. 1, Comp. Stat. sec. 1, 9 Fed. Stat. Anno. 2d Ed. page 388. *But, obviously, this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute.* See *Garrigus* vs. *Parke County,* 39 Ind. 66, 70: *Moynahan* vs. *New York,* 205 N. Y. 181, 186, 98 N. E. 842.

* * * * * *

But it is said that the establishment of a branch bank is the exercise of an incidental power conferred by sec. 5136, Rev. Stat. (Comp. Stat. sec. 9661, 6 Fed. Stat. Anno. 2d Ed. p. 654), by which the national banking associations are vested with *"all such incidental power as shall be necessary* to carry on the business of banking." The *mere multiplication* of places where the powers of a bank may be exercised is *not,* in our opinion, a *necessary incident* of a banking business, within the meaning of this provision. Moreover, the reasons adduced against the existence of the power substantively are *conclusive against its existence* incidentally; for it is wholly illogical to say that a power which, by fair construction of the statutes, is found to be denied, nevertheless exists as an incidental power. *Certainly, an incidental power can avail neither to create powers which,* expressly or *by reasonable implication, are withheld, nor to enlarge powers given;* but only to carry into effect those which are granted."

When the mortgage of July 1, 1870, under the above Joint Resolution was executed, experts made estimates for

the railroad and for Congress and the mortgage so executed was sufficient to construct and complete the railroad as planned, and as it was constructed and completed, and there was no intention or expectation of another mortgage being necessary or desirable. The Act and the Joint Resolution clearly limit the power of the railroad to one mortgage but where a statute making a grant of property or powers or franchises to a private individual or private corporation becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the Government or the general public. *Oregon R. & N. Co.* vs. *Oregonian Ry. Co.,* 130 U. S. 1, 26; 32 L. Ed. 837, 842; *Charles River Bridge* vs. *Warren Bridge,* 11 Pet. 420; 9 L. Ed. 773.

The words "successors and assigns" in Sections 2 and 3 of the Act of 1862 and omitted in Section 7 and other sections and not put in the Joint Resolution of May 31, 1870, are surplusage and do not carry the power to sell or assign or have a foreclosure of the mortgage, certainly without the consent of the United States.

In *Oregon Railway & Navigation Company* vs. *Oregonian Railway Company,* 130 U. S. 1; 32 L. Ed. 837, the Court stated: "It is strenuously argued, and with some degree of plausibility that the language of this proviso and the use of the words '*successors*' and '*assigns*' in other statutes, which are refered to imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, *it is not precisely the form in which we would expect to find a grant of the power to sell,* to *lease,* or to *transfer* the title, ownership, or *use of railroad* lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another.

One of the *most important powers* with which a corporation can be invested is the *right to sell out its whole property,* together with the franchises under which it is operated, or the authority to *lease* its property for a long term of years. In the case of a railroad company *these privileges, next* to the *right to build* and operate its rail-

road, would be the *most important which could be given it,* and this idea would impress itself upon the Legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the Legislature saw fit to confer such rights *it would do so in terms which could not be misunderstood.* To infer, on the contrary that it either intended to confer them or to recognize that they already existed, by the simple use of the word *'assigns', a very loose and indefinite term,* is a stretch of the power of the court in making implication which we do not feel to be justified."

(See further quotation under Point 10.)

The execution of the mortgage of July 1, 1870, under the facts alleged and the public record, exhausted the grant under the Joint Resolution for when a charter power (to mortgage) is once exhausted it is in respect to further contracts and rights as though it had never been granted and there could be no further mortgage under that Joint Resolution.

In *E. T. V. & G. Ry. Co.* vs. *Frozier,* 139 U. S. 288; 35 L. Ed. 196, the Court: "Whatever special right of mortgage were given by the Act of 1847 were exhausted. That special right was to increase its capital by the issue of bonds secured by mortgage to a sum sufficient to complete its road, and stock it with everything to give it full operation. It appears that the road authorized by this charter was completed, equipped and in full operation more than twenty-five years before the mortgage of 1881 and long before the consolidation of 1869. *Of course when a charter power is once exhausted it is in respect* to further contracts and rights, as *though it had never been granted.* So, in, 1881, when the railroad company executed its mortgage, it was not by virtue of this special grant of power, but by virtue of the general power given by subsequent statutes and the exercise of such general power must be held subordinate to the terms accompanying its grant."

In 1896 the officials of the railway company, practically all of whom were also officials of the railroad company, and the Reorganization *Managers,* were so *doubtful* that they could maintain that more than one mortgage was authorized and valid and that any and all of the mortgages in the foreclosure suits were valid, as the Joint Reso-

lution used the words "the mortgage" twice, "said mortgage" once and "such mortgage" once, that they *used every effort to prevent the Federal Court in Wisconsin from deciding this* question that was squarely presented to the Court and continued by decrees without being determined and which never was determined. The jurisdiction of the Court likewise never was determined.

If there is doubt in the construction of the Joint Resolution of 1870, as to the extent of the power to mortgage so granted such doubt must be resolved against the railroad company and in favor of the Government and public, whether or not the Joint Resolution permitted a mortgage on the right of way granted by Section 2 of the Act of July 2, 1864.

The facts and law determined by the Supreme Court in *Northern Pacific Railway Co.* vs. *Townsend,* 190 U. S. 267; 47 L. Ed. 1044, also resolved any doubt that might arise against the grant as authorizing a mortgage on the *right of way* of the railroad company by finding and stating: "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (*New Mexico* vs. *United States Trust Co.,* 172 U. S. 171, 181, 43 L. Ed. 407, 410, 19 Sup. Ct. Rep. 128; *St. Joseph & Denver C. R. Co.* vs. *Baldwin,* 103 U. S. 426; 26 L. Ed. 578), *it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864.* But although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the Baldwin Case) 'To those necessarily implied, such as that the road shall be * * * used for the purposes designed'. Manifestly, the land forming the right of way was not granted with the intent that it might be *absolutely disposed of* at the *volition of the company.* On the contrary, the grant was explicitly stated to be for a designated purpose,—one which negated the *existence of the power to voluntarily alienate the right of way or any portion thereof.* The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a *limited fee, made on an implied condi-*

tion of reverter in the event that the company ceased to use or *retain the land* for the purpose for which it was granted."

* * * * *

"To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

In *U. S.* vs. *Stanford*, 161 U. S. at 416, 40 L. Ed. 754, the Court said the Act of July 1, 1862, provided "to secure the repayment to the United States, as hereinafter provided, of the amount said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto constitute a mortgage on* the *whole line* of the *railroad* and *telegraph, together with* the *rolling stock, fixtures,* and *property* of *every kind and description,* and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the *said road,* with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default shall remain in the ownership of said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States".

While the Northern Pacific Act does not name *right of way,* etc., in clause authorizing the mortgage.

In *Kindred* vs. *Union Pacific Railroad Co.,* 225 U. S. 582, 56 L. Ed. 1216, the Court said: At an early stage of the case it appears to have been contended that the appellants acquired title to parts of the right of way by adverse possession; but as the contention is expressly abandoned in the brief, evidently in view of the ruling in *Northern P. R. Co.* vs. *Smith,* 171 U. S. 260, 43 L. Ed. 157,

18 Sup. Ct. Rep. 794; *Northern P. R. Co.* vs. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. Rep. 671; and *Northern P. R. Co.* vs. *Ely,* 197 U. S. 1, 49 L. Ed. 639, 25 Sup. Ct. Rep. 302, it need not be considered.

In *St. Jo. and Denver City R. R. Co.* vs. *Baldwin,* 103 U. S. 426 at 429, 26 L. Ed. 578 at 579, which was quoted in Townsend case above, the Court, after stating one section, granted the right of way and other sections aid lands with lieu lands, said: "But the grant of the right of way, by the 6th section, contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

"The right of way for the whole distance of the proposed route, was a very important part of the aid given. If the Company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given, but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the Act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed, is conclusive that none exists.

"We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed."

In *Memphis R. R. Co.* vs. *Berry,* 112 U. S. 609, 28 L. 837, the Court said: "It was in April, 1877, that the

plaintiff in error was organized as a Corporation, deriving its authority for that purpose, as it claims, under the special Act of January 11, 1853, but without power to do so, as is claimed on behalf of the defendant in error, except as enabled by the Act of December 9, 1874.

The case of the plaintiff in error rests entirely upon the words of the 9th section of the Act of incorporation of the Memphis and Little Rock Railroad Company of January 11, 1853, by which it was empowered to borrow money 'on the credit of the Company and on the mortgage of its charter and works'."

And the Court held that the franchise to be a corporation could not be mortgaged or sold.

This was followed in *N. O. D. Co.* vs. *La.,* 180 U. S. 329; 45 L. Ed. 556.

POINT 8.

No suit could be prosecuted for foreclosure of the mortgage authorized by the joint resolution of 1870 unless the United States was made a party thereto and the United States never gave any authority for the so-called foreclosure suits in 1875 and 1896 and the Government never consented to be or be made a party to either of said suits.

This Point will be considered with Assignment of Error III (R., 1218, Appendix, p. 71).

Congress refused to recognize any title in the land in the Northern Pacific Railway Company as is shown by the Act of July 1, 1898, as Congress knew that the United States was a necessary party to any suit to foreclose the mortgage under the Joint Resolution. Appellants and associates helped obtain the passage of this Act.

This was before the Hoover suit was filed in 1900 and Congress was not inclined to take action then to settle the dispute and purposely left the question open.

In 1929 Congress knew of the then status of the Hoover suit and as it was then shown from the actual suit pending that the question of title could not be contested or settled unless the United States was a party to the suit for such determination of the disputes, therefore, Con-

gress passed the Act of June 25, 1929, authorizing this suit in its own name, requiring a finding of fact and determination of all disputes named in Section 5 of the Act, and thereby consenting for the United States to be a party to litigation to settle the title and various contentions.

This statute is very broad and sweeping in its terms, and requires the putting in issue of various matters which if set up in an ordinary suit would make it multifarious.

It seems clear that this *action* of Congress is *conclusive* that *Congress construed* the *Act* of July 2, 1864, and the Joint Resolution to *require* the *United States* to be made a *party* to *any suit involving* the *mortgage* under the Joint Resolution and any question of title of land grants in the said Act and Joint Resolution.

At the time of the said foreclosure proceedings in 1896 there were large acreages of unsurveyed and unidentified lands which stood in the name of the United States, and yet the so-called foreclosure proceedings stated that such unsurveyed and unidentified lands were being sold, and they contended they passed in good fee simple title based on the said void decrees of sale, notwithstaning the United States which held legal title was not a party to this suit.

It is hard to understand how any intelligent attorney would make such contentions in this court or any other court in view of all of the Federal and State decisions to the contrary.

In the Roberts case above it is stated "It is obvious that the effect of this legislation of Congress was to grant the power to construct and *maintain* a public highway for the use of the people of the United States, and subject in important respects to the control of Congress".

Under this principle no court could divest Congress of that control unless Congress consented, and the United States became a party to such suit.

In *Ribon* vs. *Chicago, R. I. & Pac. R. R. Co.,* 16 Wall. 446; 21 L. Ed. 367 at 368, the Court said: "The want of parties is the only point we have found it necessary to consider.

The rule in equity as to parties defendant is, *that all whose interests will be affected* by the decree sought to be obtained *must be before the court;* and if any such persons cannot be reached by process (do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties) the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable. The act of Congress of 1839 and the rule of this court upon the subject give no warrant for the idea that parties whose presence was before indispensable could be thereafter be dispensed with. The subject was fully considered in *Shields* vs. *Barrow,* 17 How. 130, 15 L. Ed. 158. What is there said need not be repeated."

In *Bolton* vs. *Ickes,* 67 App. D. C. 112; 89 F. (2d) 856, 65 W. L. R. 847, the Court held and said: "It is the general rule in equity, that in order that a final and complete decree may be made, all persons 'are to be made parties who are legally or beneficially interested in the subject matter and result of the suit'. *Caldwell* vs. *Taggart,* 4 Pet. 190, 202; *Gregory* vs. *Stetson,* 133 U. S. 579, 586."

The Court also held that the *matter is jurisdictional* and the *Court could,* and possibly should, *raise it on the Court's own motion.*

This case cites *Shields* vs. *Barrow,* 17 How. 129, 193; 15 L. Ed. 158, as a leading case.

In *Skeen* vs. *Lynch,* 48 Fed. (2d) 1044, 1045-6 (C. C. A. 10) (*certiorari* denied: 284 U. S. 633), the court said, in holding that where a patent conveying stock-raising lands reserved coal and other minerals, and the patentee sought to quiet title to oil and gas as against the government's prospecting permittees, the United States was an indispensable party: "As to the first cause of action, the court is of the opinion that the United States is an indispensable party. The plaintiff asserts title to the oil and gas under the said 640 acres. The United States in its patent conveying the lands to appellant excepted and reserved to itself 'all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine, and remove the same * * * . The bill

shows that defendants named claim no interest in the oil and gas other than as permittees and prospective lessees of the United States.

The interest of the United States in the subject matter in litigation is not less obvious and substantial than it was in the case of *Louisiana* vs. *Garfield,* 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92, in which it was held to be an indispensable party. The bill discloses the claim of ownership of the oil and gas made by the United States. * * * A decree for plaintiff on the first count would be a cloud on the title of the United States, and its permittee and prospective lessee would be subject to ouster if she continued to attorn to the United States.

In *New Mexico* vs. *Lane,* 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588, the state claimed title to forty acres under Congressional grant and prayed that it be adjudged the owner. A certificate of purchase of the forty acres of coal land had been issued to one Keepers by the United States. Held, Keepers was an indispensable party.

In *California* vs. *Southern Pacific Co.,* 157 U. S. 229, 15 S. Ct. 591, 599, 39 L. Ed. 683, it was held that 'if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties', the court cannot proceed with the adjudication in their absence; that 'the familair rule in equity, * * * is the doing of complete justice by deciding upon and settling the rights of all persons materially interested in the subject of the suit, to which end such persons should be made parties'. * * * So much for the first count. The motion to dismiss it on the ground that the United States was an indispensable party was well taken.''

Quotations supporting this Point are in the Appendix: *Calif.* vs. *S. P.,* p. 44; *Gregory* vs. *Stetson,* p. 43; *Carroll* vs. *N. Y. Life Ins. Co.,* p. 46; *Eastman, &c., Co.* vs. *U. S.,* p. 47; *Reid* vs. *U. S.,* p. 47; *Choctaw Nation* vs. *U. S.,* p. 47; *Den.* vs. *Hoboken, L. & J. Co.,* p. 49.

In *New Mexico* vs. *Lane,* 243 U. S. 52 at 58; 61 L. Ed. 588 at 591, the court said: ''The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana* vs. *Garfield,* 211 U. S. 70, 53 L. Ed. 92, 29 Sup. Ct. Rep. 31. In that case a bill was brought in this court to establish the title of the state of

Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.

"Under the statute, it was contended, the land vested in the state in fee simple; that is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a *question* of *law whether* the *Act* of June 21, 1898, *had the quality as a grant of the land,* asserted of it, whether of itself or because of its terms or their prior construction and its adoption; indeed, whether there was such a prior construction or its adoption; and again, of the fact of the character of the land at the time of the grant, and the evidence of it and the knowledge of it.

"It would seem, besides, that, under the averments of the bill, Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof. To make him a party would oust this court of jurisdiction, if he is a citizen of New Mexico, and the presumption expressed by defendants that he is complainant does not deny. *California* vs. *Southern P. Co.,* 157 U. S. 229, 39 L. Ed. 683, 15 Sup. Ct. Rep. 591."

Dismissed.

In an equity case, every indispensable party must be brought into court, or the suit will be dismissed by the court on its own motion. *Chicago, M., St. P. & P. R. Co.* vs. *Adams County,* 72 Fed. (2d) 816, 818 (C. C. A. 9), and numerous cases cited. Following and quoting from *Minnesota* vs. *Northern Securities,* 184 U. S. 199, this Court says: "When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl., Para. 72.

"The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties

to the suit is founded upon clear reasons, and *may be enforced by the court, sua sponte,* though not raised by the pleadings or suggested by the counsel. (Cases cited.)

This case held that where a county was sued to cancel a tax that the County Treasurer was also a necessary party, following *Skagitt County* vs. *N. P. Ry. Co.*, 61 F. (2d) 638 (C. C. A. 9).

This decision with the cases cited are conclusive that the United States was a necessary party to any suit to foreclose any mortgage claimed to have been executed by the Railroad Co.

In *Consolidated Water Co.* vs. *City of San Diego,* 93 Fed. 851 (C. C. A. 9), the Court says: "In *Gregory* vs. *Stetson,* 133 U. S. 579, 586, 10 Sup. Ct. 422, 424, where the circuit court entered a decree dismissing the bill for want of proper parties, Lamar, J., in delivering the opinion of the court, said:

'We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story, Eq. Pl., Sec. 72.' " (See quotation from *Gregory* vs. *Stetson* in Appendix (p. 43).

In *Central Pacific Railroad Company* vs. *Gallatin,* 99 U. S. 727, 25 L. Ed. 504, the court held:

By the Act of Congress of 1862, all the rights, privileges and franchises, including land-grants and subsidy bonds were given to the Central Pac. R. R. Co., that were granted to the Union Pac. R. R. Co., except the franchise of being a Corporation which it already possessed under the laws of California.

That State, by implication at least, has given its assent to what was so done by Congress.

The Act of Congress of 1864, granting to the former Company certain additional corporate powers and pecuniary resources reserved to Congress full power of amendment.

The Central Pacific Co. assigned to the Western Pacific Co., organized under the law of California, its rights under the Act of Congress, to construct the road between San Jose and Sacramento, and this assignment was ratified, and further privileges given it by Congress.

The establishment of a sinking fund by the Act of 1878,

is within the power of Congress and is not at all in conflict with anything contained in the original state charters.

The Court said:

"Under this legislation we are of the opinion that, to the extent of the powers, rights, privileges and immunities granted these corporations by the United States, Congress retain the right of amendment, and that in this way it may regulate the administration of the affairs of the Company in reference to the debts created under its own authority, in a manner not inconsistent with the requirements of the original state charter, as modified by the state Aid Act of 1864, accepting what had been done by Congress."

The Union Pacific case, 99 U. S. 700, 25 L. Ed. 496, decided the same day with this case was exactly the same except that the Union Pacific was chartered by Congress.

California vs. *S. P.,* 39 L. Ed. 683, the Court held that a court cannot adjudicate directly upon a party's right, without the party being actually or constructively before the court.

The Court said: "It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court (*Marbury* vs. *Madison,* 5 U. S. 1 Cranch, 137, 173, 174 (2: 60, 72), and no attempt to do so is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the state is plaintiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a state and citizens of another state and of the same state. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction. Bill dismissed."

Extended quotations sustaining this Point are in the Appendix from *Ritchie* vs. *Sayers,* 100 Fed. 521 (D. C. W. Va.), p. 42; *Calif.* v. *S. P.,* p. 44.

POINT 9.

The Northern Pacific Railroad Company was created by the act, and still is, an agency of the United States Government to be used in transportation of mail and troops and for other purposes in behalf of the Government, and neither the State of Wisconsin nor any other state can tax the same and thereby have the power to destroy such railroad and such agency of the Government in the manner that the State of Wisconsin or other states can by taxation destroy the said Northern Pacific Railway Company of Wisconsin or other state created corporations of such state as creates it.

POINT 10.

Under the Act of July 2, 1864, and the acts amendatory thereof, the railroad company was never at any time able, nor had authority, or power, to sell, transfer, convey by deed, lease or other contract its railroad property, assets and lands to any other corporation.

POINT 11.

The State of Wisconsin, under the law and under the decisions of the Supreme Court of the United States, cannot change the Northern Pacific Railroad or any of its property, assets and lands or in any way prejudice or destroy them by any legislation or judicial determinations of the State of Wisconsin or prejudice, injure, depreciate, or destroy the rights of the stockholders of the Northern Pacific Railroad Company.

Points 9, 10 and 11 with assignment of error 13, 16, 17 (see appendix, pp. 75, 76, 77) will be considered together.

Railway attorney Kerr testified that in *L. S. & M. P. R. Co.* vs. *U. S.,* 93 U. S. 442; 23 L. Ed. 965, the railroad company was an agent of the United States.

California vs. *Central Pacific R. Co.,* 127 U. S. 1; 32 L. Ed. 150, held that railroads created by Act of Congress like the Northern Pacific Railroad Company were agents of the Federal Government and could not be taxed by the State.

In *Osborn* vs. *United States Bank,* 9 Wheat. 738, 823, 6 L. Ed. 204, the Court found and determined: "The charter of incorporation not only creates it, but gives it every

faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being *can acquire no right, make no contract,* bring no suit, *which is not authorized by a law of the United States.* It is not itself the mere creature of a law, but all its actions and all its rights are dependent on the same law" (R., 1119).

In *Chicago T. & T. Co.* vs. *Forty-one Thirty-six W. Corp.,* 302 U. S. 120, 82 Law 109, 113, the Court held and said: "How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. *Horn Silver Min. Co.* vs. *New York,* 143 U. S. 305, 312, 313, 36 L. Ed. 164, 167, 168, 12 S. Ct. 403, 4 Inters. Com. Rep. 57; *Ashley* vs. *Ryan,* 153 U. S. 436, 441, 443, 38 L. Ed. 773, 776, 778, 14 S. Ct. 820; *New Jersey* vs. *Anderson,* 203 U. S. 483, 493, 51 L. Ed. 284, 288, 27 S. Ct. 137, 17 Am. Bankr. Rep. 63. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the Federal Government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority." * * *

"And since the Federal Government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority."

Neither Wisconsin nor any other state can tax the Railroad Company or any other Federal corporation out of existence, for in the case of *California* vs. *Central Pacific R. Co.,* 127 U. S. at 41, 32 L. Ed. at 158, the Court said: "In view of this description of the nature of a franchise, how can it be possible that a *franchise granted* by *Congress* can be *subject to taxation by a State without the consent of Congress?* Taxation is a burden, and may be

laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* vs. *Maryland,* 17 U. S. 4, Wheat. 316 (4:579), 'the power to tax involves the power to destroy'. Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. *To tax it is not only derogatory to the dignity, but subversive of the powers, of the government,* and *repugnant to its paramount sovereignty.''*

The railroad company under its charter and the laws of Congress had no authority to and could not lease or convey or by any other contract turn over its entire road and property to another corporation nor could it lease or convey or by any other contract turn over its road and property in the State of Oregon unless it was specifically authorized by the statute creating it to do so; nor could the railway company receive the property of the railroad company by any of the means above mentioned in the State of Oregon under the law and facts determined in *Oregon Railway and Navigation Company* vs. *Oregonian Railway Company,* 130 U. S. 1; 32 L. Ed. 837 (1888), quoting *Thomas* vs. *West Jersey Railroad,* 101 U. S. 71; 25 L. Ed. 950; *Pennsylvania R. Co.* vs. *St. Louis, etc., Co.,* 118 U. S. 290, 309; 30 L. Ed. 83, 92; *Charles River Bridge* vs. *Warren Bridge,* 36 U. S. 11; 9 L. Ed. 773, and many English and American cases.

This Oregon Co. decision *prohibited* the exchange of stock or so-called reorganization or *void* foreclosure of 1896 of the railroad company not only *in* the State of *Oregon,* but also in the States of *Wisconsin, Minnesota, Montana, Idaho* and *Washington.* The Oregonian Railway Company was organized under the laws of Scotland and the Oregon Railway & Navigation Company under the laws of the State of Oregon. In the Oregon Co. case it was contended that leases and acts *ultra vires* of the char-

ter and statute could not be attacked by the railroad companies, but would have to be by the state, which contention was not sustained but overruled, and the Court held that: The plaintiff, the Oregonian Railway Company (Limited) organized under the laws of Great Britain, with such aid as the Statute of Oregon gives to it in reference to business done in that State, had no power to execute the lease of its railroad to the defendant company, mentioned in the opinion.

It was also held that the Oregon Railway and Navigation Company, the defendant in the action, organized under the Laws of the State of Oregon, had not the legal capacity and lawful power to make said lease on its part.

* * * * *

The Court said: "It may be considered as the *established doctrine of this court* in regard to the *powers of corporations,* that they are *such and such only* as are *conferred* upon them by the Acts of the Legislatures of the several States under which they are organized. A corporation in this country, whatever it may have been in England at a time when the Crown exercised the right of creating such bodies, can only have an *existence under the express law* of the State or *Sovereignty by which it is created.*"

* * * * *

"This proposition has been before this court more than once in recent years. It was very fully considered in *Thomas* vs. *West Jersey Railroad Company,* 101 U. S. 71 (25:950), which resembled the case before us in several important features."

* * * * *

"The question turned altogether upon the power of the railroad company, under its charter and the Laws of New Jersey, to make the lease by which its road was turned over for twenty years to the absolute control of other parties. The right to do this was asserted under the following language in the charter of the company:

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts.

"But the court said that it was impossible under any sound rule of construction to find in this language *a per-*

mission to sell, lease or transfer to others the entire railroad and the rights and franchises of the corporation."

"The cases of *Ashbury Railway Carriage & Iron Company* vs. *Riche,* L. R. 7, H. L. 653, decided in the House of Lords in 1875, and *East Anglian Railway Co.* vs. *Eastern Counties Railway Company,* 11 C. B. 775, were also reviewed, with several others of a similar character from the reports of the highest courts of England, in which, as this court said—

'The broad doctrine was established that a contract not within the scope of the powers conferred on the corporation *cannot* be *made valid* by the *assent* of *every one* of the *shareholders,* nor can it by any partial performance become the foundation of a right of action.'

Reference was also made in the same opinion to the case of *York & Maryland Line Railroad Company* vs. *Winans,* 58 U. S. 17 How. 30 (15:27), which held that a corporation which has undertaken to construct and operate a *railroad cannot, by alienating* its *right* to *use* and its *powers* of control and *supervision, avoid* the *responsibility* that it *assumed* in accepting the *charter.* The court said: 'The corporation *cannot absolve* itself from the performance of its *obligations without the consent* of the *Legislature.*' To this effect were cited *Beman* vs. *Rufford,* 1 Sim. N. S. 550, and *Winch* vs. *Birkenhead, L. & C. J. R. Co.,* 13 Eng. L. & Eq. 506.

Afterwards in *Green Bay & M. R. Co.* vs. *Union Steamboat Co.,* 107 U. S. 98 (27:413), the case of *Thomas* vs. *West Jersey R. Co., supra,* was referred to with approbation.

Still later, in the case of *Pa. R. Co.* vs. *St. Louis, A. & T. H. R. Co.,* 118 U. S. 290, 309 (30:83, 92), where the whole question was reconsidered after a full argument, the conclusion was stated in the following language:

'We think it may be stated, as the just result of these cases and on sound principle, that unless *specially authorized* by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other *contract turn over to another* company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the *exercise of its powers; nor* can any *other* railroad company *without similar authority* make a contract to *receive* and *operate* such road, franchises, and property of the first corporation and that such a contract is not among the ordinary powers of a railroad company,

and is not to be presumed from the usual grant of powers in a railroad charter.'

It may be considered that this is the Law of the State of Oregon, except as it has been altered or modified by its Constitution and statutes."

* * * * *

"We have examined with much care the two statutes already referred to concerning incorporations, enacted in accordance with that constitutional provision, and do not find any express authority for a railroad company to lease its road for an indefinite period, or for it to take such a lease; nor are we able to find any general language in those statutes, or either of them, in relation to the powers that may be conferred upon corporations, which justifies a departure from the principles laid down in *Thomas* vs. *Railroad Company.*

It is to be remembered that where a statute making a grant of property, or of powers, or of franchises, to a private individual or a private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule is that in *doubtful points* the construction shall be against the grantee and in favor of the Government or the general public. As was said in the case of *Charles River Bridge* vs. *Warren Bridge,* 36 U. S. 11, Pet. 420 (9:773): 'In this court the principle is recognized that in *grants by the public nothing passes by implication.*' See also *Dubuque & P. R. Co.* vs. *Litchfield,* 64 U. S. 23, How. 66 (16:500); *St. Clair Co. Turnpike Co.* vs. *Ill.,* 96 U. S. 63 (24:631).

Therefore, if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an Act of the Legislature of Oregon conferring such powers on the corporation, they would be subject to the rule above stated and to rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a court called upon to determine the powers granted by these articles of association construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation."

* * * * *

"It is strenuously argued, and with some degree of plausibility, that the language of this proviso and the use

of the words *successors* and *assigns* in other statutes, which are referred to, imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, it *is not precisely the form in which we would expect to find a grant of the power to sell,* to *lease,* or to *transfer* the title, ownership or *use of railroad* lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another.

One of the *most important powers* with which a corporation can be invested is the *right to sell out its whole property,* together with the franchises under which it is operated, or the *authority* to *lease* its property for a long term of years. In the case of a railroad company *these privileges, next* to the *right to build* and operate its railroad, would be the *most important which could be given it,* and this idea would impress itself upon the Legislature. Naturally, we would look for the *authority* to *do* these *things* in some *express provision* of law. We would suppose that if the Legislature saw fit to confer such rights *it would do so in terms which could not be misunderstood.* To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word *assigns, a very loose* and *indefinite term,* is a stretch of the power of the court in making implications which we do not feel to be justified."

The legislators who enacted these statutes may have had an idea that there were certain things which corporations could assign; they may have used the expressions to which we have referred in a *very loose* instead of a *technical sense;* or they may have supposed that cases might arise where the railroad property going by some operation of law, as bankruptcy or foreclosure, from the hands of its orignial owners into the possession of other persons, would justify the description of the latter by the words *successors and assigns.* In using these terms they may have thought that *authority might be given by future statutes,* either generally to all corporations or to *some special organization,* to sell or transfer the corporate property or some part of it. But whatever may have been their purpose, we think the *argument is a forced one, which would vest in railroad companies* the *general power to sell or* lease their property or franchises, or to make contracts to buy or take leases of the same from other railroad cor-

porations, *from the use* which is made of these indefinite terms *"successors or assigns"*.

* * * * *

The language used in the statute in question in this case is stronger than that in other cases cited to us by counsel, and we are of opinion that they do not, any of them, *nor do they collectively, establish* the proposition, that by the *Laws of Oregon* a *railroad* company could *sell or lease* its *entire property,* franchises and powers to another company, *or take a grant or lease* of similar property or franchises from any other person or company."

We believe it important and request that the Court read the quotations in the Appendix from the following cases equally as strong on these questions: Charles River Bridge case, p. 50; *Thomas* vs. *West Jersey,* p. 55; *P. R. R.* vs. *St. L. &c., Co.,* p. 55.

In *Roberts* vs. *Northern Pacific Railroad Co.,* 158 U. S. 1; 39 L. Ed. 873 at 879, 880, attorney for the Railroad Co., the Court said: "It is contended, on behalf of the plaintiffs in error, that where the question involves the powers of a state corporation, and the meaning and effect of the constitution and laws of a state, it is the duty of this court to adopt the decisions of the courts of such state. But we do not perceive that the doctrine of *Whiting* vs. *Sheboygan & F. du L. R. Co., supra,* and of the cognate Wisconsin cases, is fairly applicable to the case before us. *There are two very important particulars in which the present case differs from those adjudicated by the Wisconsin courts,* and which, we think, warrant an opposite conclusion. In the first place, the transaction between the county of Douglas and the Northern Pacific Railroad Company did not involve the exercise of the taxing power of the county. The county did not issue bonds, or seek to subject itself to any obligation to raise money by taxation. The case, as already stated, was that of a sale. The county authorities had ample powers to sell and convey such of its lands as were not used or dedicated to municipal purposes.

* * * * * *

By an Act aproved April 10, 1865, the legislature of the state of Wisconsin, declared that, *for the purposes set forth in said Act of Congress,* and *to carry the same into full effect,* the Northern Pacific Railroad Company was *vested with all the rights, powers, privileges and immunities within*

the limits of the state of Wisconsin which were *given by said Act of Congress.*

* * * * * *

Hence, if the contention were true that the state of Wisconsin through its judiciary, can deprive that portion of the railroad within its borders of its national character, and declare the Northern Pacific Railroad Company to be a priavte corporation not engaged in promoting a *public purpose,* the same would be true of the other states through which the road passes. *Such a contention,* we think, *cannot be successfully maintained.*

Congress has power "to regulate commerce with foreign nations and among the several states," and to "establish postoffices and post roads." Const. art. 1, sec. 8, par. 3 and 7. As was said in *Pensacola Teleg. Co.* vs. *Western U. Teleg. Co.,* 96 U. S. 10 (24:710), "The government of the United States, within the scope of its powers, operated upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all;" and it was held, that a law of the state of Florida which attempted to confer upon a single corporation of its own, the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory, was inoperative against a corporation of another state, where Congress had enacted "that any telegraph organized under the laws of any state should have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States," and where such other corporation had secured a right of way by private arrangements with the owners of the land. This principle has been repeatedly recognized by this court in numerous decisions. *Western U. Teleg. Co.* vs. *Texas,* 105 U. S. 460 (26:1067.)

* * * * * *

We think, therefore that when the Circuit Court of the United States for the District of Wisconsin was called upon, in the present case, to pass upon the character, powers, and rights of the Northern Pacific Railroad Company, it was bound to regard that company as a corporation of the United States, created for national purposes and as a means of interstate commerce and *not to apply to it the*

views of the Wisconsin courts pertainng to their local railroads.

Upon the principle of these cases it is obvious that the *state of Wisconsin* at least after it had given its consent to the Northern Pacific Railroad Company to enter into its territory and construct its road, and such consent had been acted on, *could not by hostile legislation, hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national legislation* for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations.

* * * * * *

But it is further contended, on behalf of the plaintiffs in error, that whether the transaction between the county and the company was that of a sale for a sufficient consideration, or whether the Northern Pacific Railroad Company is a corporation invested with powers of a national origin and subjected to duties of a national character, were not questions open for consideration in the court below because of the case of *Ellis* vs. *Northern Pac. R. Co.*, 77 Wis. 118.

That was a case wherein J. F. Ellis, one of the plaintiffs in error in the present case, had filed a bill of complaint against the Northern Pacific Railroad Company in a circuit court of the state of Wisconsin, seeking to quiet his title to certain lots of land. These lots had been conveyed to Ellis by Roberts, who claimed to have purchased them from the county of Douglas, and were some of the lots sold and conveyed by that county to the Northern Pacific Railroad Company, but were not lots included in the present controversy. The railroad company demurred to the complaint; the circuit court overruled the demurrer; from the order so overruling the demurrer an appeal was taken to the supreme court of Wisconsin; and that court on May 20, 1890, affirmed the order of the circuit court, and remanded the cause for further proceedings. In its opinion the court said: "There is nothing to distinguish this case, or to take it out of the decision in the Whiting case; for if the county could not donate money or securities to the railroad corporation it could not give its lands, which are the property of the county."

It is observable that the court's attention does not

seem to have been drawn to those facts which are calculated to justify a finding that the transaction was a sale on consideration, and not a donation, nor to the real character of the Northern Pacific Railroad Company *as a national organization,* and thus distinguish from a local railroad company, which was dealt with by the Wisconsin courts in the Whiting case. This inattention by the supreme Court of Wisconsin to such important particulars was probably occasioned by the fact that the case was before them on a demurrer by the company to the complaint of Ellis. It is further to be observed that no final judgment was entered by the supreme court of the state, but the cause was remanded to the court below for further proceedings.

The law is also well settled that a Congress granted Telegraph Franchise and right of way cannot be voluntarily sold or lost to another grantee or successor.

This rule and law is well expressed in *U. S.* vs. *U. P. R. C.,* 160 U. S. 1; 40 L. Ed. 316, 334, upon Act of Congress granting right of way in 1862 substantially same as that of N. P. R. Co. of July 2, 1864, as follows: "In reference to the agreements of 1869 and 1871 between the Union Pacific Railroad Company and the Atlantic & Pacific Telegraph Company, but little need be said to show that they were void. By those agreements the former corporation demised and leased to the telegraph company, to whose rights, it may be assumed, the Western Union Telegraph Company succeeded, all the telegraph lines, wires, poles, instruments, offices, and other property appertaining to telegraph business, that were possessed by the railroad company. These agreements were annulled by the circuit court, and it was likewise so adjudged by the circuit court of appeals. The same conclusion had been previously announced by Judge McCrary in *Atlantic & P. Teleg. Co.* vs. *Union P. R. Co.,* 1 McCrary, 541, 547. That able judge well said: 'I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating, and maintaining a line of telegraph for commercial and other purposes and that this is in its nature a public

duty. I am further of the opinion that, by the provisions of the contract of September 1, 1869, and of December 20, 1871, the ralroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be "the demise of their telegraph lines, property, and goodwill, and of the rights and privileges, in the manner hereinafter specified," etc.; and the property demised by the railroad company is 'all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraph business.' The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimate I do not think this latter clause makes the contract good. The railroad company was not at liberty to transfer to others those important duties and trusts which it, for a large consideration and for a great public purpose, had undertaken to perform. It certainly could not devest itself of these powers and duties, and devolve them upon the plaintiff without express authority from Congress."

* * * * * *

"But if the *contracts* in question are not *ultra vires* by reason of the transfer of property necessary to the performance, by the railroad company, of its public duties, *they are so because they attempt to transfer certain franchises of the said company.* The right to operate a telegraph line, and to fix and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by Congress upon the railroad company as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts, I am compelled to hold that *this*

feature is *alone sufficient* to *render them* in *excess* of the *corporate power* of the company."

* * * * * *

But that agreement is illegal, not simply to the extent that it assumes to give to the Western Union Telegraph Company exclusive rights and advantages in respect of the use of the way of the railroad company for telegraph business, but it is *also illegal because,* in effect, *it transfers* to the *Western Union* Telegraph Company the *telegraphic franchise granted* it *by* the government of the *United States.* The duty to maintain and operate a telegraph line between the points specified in the Act of 1862 was committed by Congress to certain corporations which it named, and neither they, *nor any corporation* into which they were merged, could, *without the consent of Congress, invest* a *state corporation* with exclusive telegraphic privileges on the line of the roads it then owned or thereafter acquired. The United States was not bound to look to the Western Union Telegraph Company for the discharge of the duties the performance of which in consideration of the aid received from the government, the Union Pacific Railroad Company, and other named companies, undertook to discharge for the benefit of the United States and of the public. No agreement with the telegraph company, to which the assent of the govenment was not given, could take from the railroad company its right at any time to itself maintain and operate the telegraph line required by the act of 1862 for the use of the government and of the public, nor impair the power of Congress to require the performance by the railroad company itself of the duties imposed by that act."

U. S. vs. *N. P. Ry. Co. & Western Union Telegraph Co.,* 160 U. S. 1; 40 L. Ed. 316, *334.*

This would seem to be conclusive that the right and franchise of the N. P. R. R. Co., to construct and operate a perpetual telegraph public system and railroad for its use as well as for public use and government use could not be alienated by contract without consent of the U. S.

In *Pullman Palace Car Co.* vs. *Central Transportation Co.,* 139 U. S. 24, 35 L. Ed. 55 at 68, the Court said: "The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly

implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." 101 U. S. 82 (25: 952.)

"There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, *shows very clearly that the railroad company was without the power to make such a contract.* That principle is that, where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of these functions being the consideration of the public grant, any contract which undertakes, *without the consent of the State,* to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." 101 U. S. 83 (25: 952).

It was also held in that case that the lease was not made valid by a subsequent Act of the Legislature, regulating the rates of fares and freights to be charged by "the directors, lessees or agents of said railroad,"—the court saying: "It is not by such an incident use of the word 'lessees,' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State." 101 U. S. 85 (25: 953.)

In *Branch* vs. *Jesup,* Mr. Justice Bradley delivering judgment said: "Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable, and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given for the specific purposed of the incorporating Act, but because they are essential to the fulfillment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them." * * *

"In *Pittsburgh, C. & St. L. R. Co.* vs. *Keokuk & H. Bridge Co.*, it was stated, as the result of the previous cases in this court, that "a *contract* made by a corporation, which is *unlawful* and *void* because beyond the scope of its corporate powers, *does not, by being carried into execution, become lawful and valid,* but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit,* the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389 (33: 157, 163).

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, *but wholly void,* and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. *No performance* on either side *can* give the unlawful contract any validity, or *be the foundation of any right of action* upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, either the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

POINT 12.

That there was no foreclosure nor passing of title of the properties, assets or lands of the railroad company in 1896, but only an exchange of securities similar to the proceedings of 1875, and the Federal Courts did not have jurisdiction of the subject matter, nor of the necessary parties—one necessary party—the United States,—was not made a party to the litigation; all of the decrees were and are null and void in fact and on the face of the record.

Under this Point there will also be considered assignment of error XVII (see appendix, p. 77).

In 1896 Morgan and his attorneys knew that the railroad company owned the Railway Company and that while all done was illegal, void and null because without legal authority thereby title remained in the Federal corporation and the Railway Company is only operating the system and it holds practically all the stock of the Railroad Company, and therefore a return to the former status could easily, without difficulty or legal proceedings, be restored; the Railroad Company has title and can readily resume operating the system: the mortgages and Voting Trusts of the Railway Company so provide.

Congress by the Act of 1822 opened the door for such a restoration and resumption of possession and operation by the Railroad Company—it in effect and tacitly invited same and directed the Attorney General to recommend necessary legislation to that end.

The Colton Report and the Act of 1929, as well as Act of July 1, 1898, indicate a strong implication that the Railway Company does not own but only operates the system—a holding or operating company—which operation can be easily ended as it is forbidden under *Pa R. C.* vs. *St. Louis, &c., Co.,* quoted in the Oregon Railway Company case, and is quoted in the appendix, p. 55).

In the Boyd case the opinion of the three courts are a most vigorous, trenchant indictment and condemnation of the Railway Company. They played hot and cold with

the courts, Congress and the stockholders as conditions best suited their unlawful schemes, whims and interests.

If title to the Railroad properties had passed in 1896 why was the Mt. Rainer Nat. Park deed to the U. S. of July 19, 1899 (JCC 2549), made by the Railroad Co.? Why did the Gov't require, and the Railway Co. agree to, a deed by the Railroad Co.? That the U. S. would not take the Railway Co. deed is evident from the Statute of July 1, 1898.

In the Reorganization Plan and Statement it is set forth that the lien of the 2nd and 3rd mortgages is only upon the main line, the Cokedale Spur, ½ of the line, Carlton to Duluth, and upon the Land Grant, yet in entering the decree it was declared that the 2nd mortgage is a lien not only upon those things but "upon all the stocks and bonds in other companies owned by the defendant, "The Northern Pacific Railroad Company, at the time of the appointment of receivers * * * October 13th, 1893, other than stocks and bonds, pledged under the Consolidated Mortgage, and all the right, title and interest of said defendant—in such pledged stocks and bonds, subject to the rights of the pledgees thereof."

The sale was decreed accordingly under the mortgage.

These decrees were *consent decrees,* acquiesced in by the Directors and "Protective Committee" of the railroad company in furtherance of the unlawful plan to acquire the property of the railroad company for the railway corporation.

It is more than probable that Judge Jenkins never read the decrees.

The lands and land grants west of the Missouri River and covered by the terms of the mortgage were sold under a supplemental decree in a manner directly contravening the resolution of Congress, under which it is contended, the mortgages were executed, and also contravening the Act of Congress of March 3rd, 1893.

These lands are upwards of thirty millions of acres, and are worth many millions of dollars.

The resolution of Congress of 1870 stipulated as follows:

"If the mortgage hereby authorized shall at any time be enforced by foreclosure, * * * or the mortgaged lands hereby granted, or any of them, be sold * * * such lands shall be sold at public sale at places within the states and territories in which they shall be situate after not less than sixty days previous notice, *in single sections or sub-divisions thereof* to the highest and best bidder."

By Section 1 of the Act of Congress of March 1st, 1893, it is provided:

"That *all real estate* or *any interest in land* sold under any order or decree of any United States Court, shall be sold at public sale at *the court house of the county, parish, or city in which the property or the greater part thereof is located,* or upon the premises, as the court rendering such order or decree of sale may direct."

The following and other violations of the law were had in these proceedings:

First: All the lands, patented and unpatented, were sold in but one place in each of the states in which the lands were situated, *and not in the respective counties where situated.*

Second: The lands for which patents had not been issued *were not sold in single section or sub-divisions,* but were sold lumpingly at the place in each State as above stated, for the sum of $500,000 for the lands in each State.

To acquire the remaining lands in Minnesota and North Dakota, east of the Missouri River, and not covered by the mortgage, the same being expressly except,—the railway company experienced great difficulty and had to wait three years until 1899 when a null and void order to sell *in sequestration proceedings* was made upon the Petition of the Receivers. The Receivers took the precaution to have sales made in each county of the State, but the unpatented, unsurveyed and unlocated lands were sold lumpingly and not in single sections or sub-divisions. "With respect to lands it is quite certain that sequestrators acquire no title and hence can make no sale." Freeman on Executions, 125(a). A receiver in sequestration proceedings *acquires no title to the real estate* and has but a right to the *possession. Forster* vs. *Townsend,* 48 N. Y. 203.

After acquiring the property thus sold, the new company obtained two further and separate decrees, *one in August, 1696,* decreeing a sale to it for the face value of the outstanding receiver's certificates (all of which it held), of all the securities—millions in value of excess—deposited as collateral for the payment of such certificates—and one *other decree in October, 1896,* of all the securities (over 33 millions in value) deposited as collateral for the payment of the Collateral Trust Notes which amounted to but 10 millions of dollars, and all of which were deposited with the Reorganization Managers under the Reorganization Plan to be settled for by the payment of but 7% in cash and the balance in bonds and stock of the new company.

These were collusive and illegal consent decrees and at the time *practically the same directors* acted for both companies. *The railroad company lost—the railway company profited* to the extent of many millions of dollars by the transactions.

In a petition sworn to by the receivers of the railroad company dated September 3, 1897, filed in the United States Circuit Court for the Eastern District of Wisconsin it is stated that the lands of the grant in Minnesota and North Dakota east of the Missouri River amounted to 3,738,874 acres and cited the general first mortgage, the amount of which on March 6, 1896, according to the plan, was $41,-879,000. By another fraudulent, consent and collusive decree of April 27, 1899, and a decree amending it November 25, 1899 (JCC 1441-45), this plan of sale was arranged by the group controlling the then railway system as part of its fraudulent and collusive scheme to capture, hold and prevent anyone else from buying and purchasing lands of the railroad company as no one could buy one or more single sections without taking it subject to the $41,879,000 of the first trust, as there was no arrangement under the trust or in the decree or proceedings whereby single or group sections could be released from the trust. The sale under these decrees was not carried out according to and was in contravention of the charter and the statutes, and

the sale having been made to the railway company, the Court, on affirming the report, entered a deficiency judgment of "more than $87,000,000" in favor of the railway against the railroad, without any jurisdiction to do so. Ash Sheep Co., 252 U. S. 159, 64 L. Ed. 507, quoted under Point 13.

These 3,738,874 acres were sold for $837,850 and the railway paid in cash because it was required to make a deposit of 10% at the sale in the amount of $83,785, leaving a balance on the purchase price of $757,075, which the Court allowed it to offset against the deficiency judgment for more than $87,000,000, leaving a balance on the deficiency judgment of "more than $86,242,925."

This judgment was fraudulent and obtained under an unlawful and illegal consent and collusive decree on bonds of the railroad company which had been paid and satisfied in the purchase price under the so-called reorganization plan and the railway company had issued its new bonds in lieu of same and had certified to those taking the bonds and the public, to whom the bonds were offered, that the bonds of the railway company so issued were first liens on the property of the railroad company.

This so-called fraudulent and collusive judgment of a balance of more than $86,242,925 was taken in part for the purpose of trying to hold or establish some kind of lien on the lands and property of the railroad company, as the parties to the said collusive agreement and decrees realized that they did not pass valid title from the railroad company to the railway company.

The so-called foreclosure sale in 1896 likewise was fraudulently and collusively arranged so that all of the lands and property of the railroad company described in the decree would be sold subject to the then first mortgage, and the portion covered by the Missouri Division would be sold subject to the first mortgage and the Missouri Division mortgage which amounted at that time to $1,815,500. The land covered by the Pend d'Oreil was sold subject to the first mortgage and to the Pend d'Oreil mortgage, which

then amounted to $357,000, thus making it imperative that all the land be bought by one person or corporation, and that settlers, individuals and smaller corporations could not buy part without taking it subject to and being liable for the first mortgage and, if covered by them, the Missouri Division mortgage and the Pend d'Oreil mortgage.

Lack of Jurisdiction by the Court can be attacked collaterally and the Supreme Court in *Thompson* vs. *Whitman,* 18 Wall. 457; 21 L. Ed. 897, found and determined that neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, or the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown, either as to the subject-matter or to the person, or in proceedings *in rem* as to the thing. By a law of New Jersey, non-residents were prohibited from raking clams and oysters in the waters of that state, under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made were authorized, upon information given, to hear and determine the case; held that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure, brought in New York, notwithstanding the record of a conviction was produced, which stated that the seizure was made within such county.

Tungsten vs. *Ickes,* 66 App. D. C., 3; 84 F. (2d) 257, the Court held that District of Columbia Supreme Court's consent order for entry of mandamus judgment, commanding Secretary of Interior to ascertain whether corporation incurred losses claimed in its petition for review of Sec-

retary's decision allowing in part its claim for other losses under War Minerals Relief Act, held nullity as beyond court's jurisdiction; as the claim set up in petition being new and not made within statutory time.

* * * * * *

The Court's lack of jurisdiction cannot be waived, nor jurisdiction supplied, by parties' consent or silence.

The Court said that "in this view, it is apparent that when the consent order, to which we have made reference, was entered, the record showed that here was not present in the case a dispute within the jurisdiction of the court; and hence it follows inevitably that no valid order on the merits could then be entered. 'Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void.' *Vallely* vs. *Northern F. & M. Ins. Co.,* 254 U. S. 348, 41 S. Ct. 116, 117, 65 L. Ed. 297. And so here the consent order that was entered, being beyond the court's jurisdiction, was a nullity. The defect was not formal or modal. It was jurisdictional. It was indispensable, in the circumstances, that jurisdiction should be shown, for until it was shown there was nothing on which the court could act."

* * * * * *

"Nor can this lack of jurisdiction be waived, *United States* vs. *Mayer,* 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129; nor will consent or silence supply it, *Chicago, B. & Q. R. Co.* vs. *Willard,* 220 U. S. 413, 31 S. Ct. 460, 55 L. Ed. 521."

In *Vallely* vs. *Northern F. & M. Ins. Co.,* 254 U. S. 348, 65 L. Ed. 297 at 299, 301, the Court held and said: "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, then *judgments* and orders are regarded as *nullities.* They are (354) *not voidable,* but *simply void,* and this *even prior* to *reversal. Elliot* vs. *Peirson,* 1 Pet. 328, 340, 7 L. Ed. 164, 170; *Old Wayne Mut. Life Asso.* vs. *McDonough,* 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236."

In *Boyce* vs. *Grundy,* 34 U. S. 275 (9 Peters), 9 L. Ed. at 288, the Court held and said: "We are of opinion that the decree is erroneous in this respect. In the first place,

the court had *no jurisdiction* to *decree* a *sale* to be made of *land* lying in *another State,* by a master acting under its own authority."

In *United States* vs. *Mayer,* 235 U. S. 55: 59 L. Ed. 129, at 136 the court said: "2. As the district court was without power to entertain the application, the consent of the United States attorney was unavailing. *Cutler* vs. *Rae,* 7 How. 729, 731, 12 L. Ed. 890, 891; *Byers* vs. *McAuley,* 149 U. S. 608, 618, 37 L. Ed. 867, 872, 13 Sup. Ct. Rep. 906; *Minnesota* vs. *Hitchcock,* 185 U. S. 373, 382, 46 L. Ed. 954, 961, 22 Sup. Ct. Rep. 650. It is argued, in substance, that while consent cannot give jurisdiction over the subject-matter, restrictions as to place, time, etc., can be waived (Citations). This consideration is without pertinency here, for there was no general jurisdiction over the subject-matter, and it is not a question of the waiver of mere "modal or formal" requirements, of mere private right of personal privilege."

In the appendix are quotations on this Point from *Vallely* vs. *N. F. & M. Co.,* p. 57; *Chicago B. & Q. Co.* vs. *Willard,* p. 59.

Kansas City S. R. Co. vs. *Guardian Trust Co.,* 60 L. Ed. 579 at 589, 590.

"The appellant urges that the foreclosure sale is to be treated as a distinct transaction,—that after it had become the owner of the greater part of the bonds and stock of the Belt Company it was free to do as it pleased. If it had simply kept the stock it would have incurred no liability to creditors of the Belt Company, and an independent foreclosure would put it in no worse place. But *the ownership* of the Belt Road by the new company was *contemplated from the first,* and although no fraud on creditors was suggested or intended in the plan, still the court of appeals was justified in regarding the whole proceeding as one from the start to the close, and in throwing on the appellant the responsibility of so carrying it out as to avoid inequitable results. * * * In short, while it is true that reorganization plans often would fail if the old stockholders could not be induced to come in and to contribute some fresh money, and that the necessity of such arrangements

should lead courts to avoid artificial scruples, still we are not prepared to say that the court of appeals was wrong in finding that there had been a transgression of the well-settled rule of equity in this case, or that it went further than to see that substantial justice should be done''

In the book entitled ''Some Legal Phases of Corporate Financing, Re-Organization and Regulation,'' by Francis Lynde Stetson, James Byrne, Paul D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie, it is stated at page 212: ''Except in a comparatively rare case of redeemable preferred stock, there is usually *no way* in a *voluntary readjustment* by which the *status* of *stock can be changed without* the *consent* of its *holders,* nevertheless it becomes necessary in such a case *to continue the non-assenting* stock *without disturbing its status,* except so far as may be permitted by the exercise of the *powers* expressly *conferred* by the *corporation's charter* or by the statute subject to which the corporation was reorganized.''

This book also says that they *hoped* to *be relieved* from the *terrors* of the *Boyd case,* but instead it was practically re-affirmed in *Kansas City Southern Railroad Co.* vs. *Guardian Trust Co.,* 240 U. S. 166; 60 L. Ed. 579. The non-assenting N. P. Railroad Stock on the agreed actual value in 1896 of Railroad Company properties of $345,000,000, was worth $203.00 per share of the par value of $100.

The *United States* Court in *Minnesota dismissed* the suit of the creditors and stockholders as *without* jurisdiction. The purpose of these suits in Wisconsin, Minnesota, Washington and the other states traversed by the railroad company was to stop and forestall Brayton Ives, who was president, and his associates from taking over control of the Board of directors and the property of the railroad company, which control they were just about to obtain.

Because of differences of opinion in the different districts a friendly petition by consent was presented to the four associate justices of the Supreme Court of the United States who were assigned to the four circuits traversed

by the railroad company, seeking to have the Wisconsin Court made the primary court. The ruling and order thereon reported in 72 F. 30, made by the four justices, *who were not legally sitting as a Court,* seems to have been had solely because desired and agreed to by all parties to the record. The order made, it will be perceived, is *confined* to the *foreclosure* and *no mention* is made of the *creditors' bills;* yet there were vast land grants east of the Missouri River, several million acres in Minnesota and large acreages in North Dakota, all of which were expressly exempt from the operation of the mortgages.

In the opinion of three of the justices they state: *"In expressing these views, we are not to be understood as passing upon the proposition advanced in argument, but not necessary to be here considered, that it is competent for a circuit court of the United States, by consent of parties, to foreclose the mortgage of a railroad, no part of which is within the territorial jurisdiction of such Court."*

Mr. Justice Brown's opinion was that the Wisconsin Court had no jurisdiction to foreclose the mortgage but he acceded to the wishes of the others as a matter of expediency.

The decree of foreclosure directed a sale under the mortgages of stock, bonds and other property in the hands of the receivers which were not in any way covered by the mortgages.

This was entirely independent of the separate decrees directing sales to the new company by the receiver of securities pledged for Receiver's Certificates and Collateral Trust Notes.

The Texas Court after a careful review of all the Federal decisions, held that a Circuit Court of the United States in Louisiana had no jurisdiction over property in Texas such as conferred upon it the power to appoint a Receiver of a railroad in Texas owned by a corporation created by Congress. *T. & P. R. R. Co.* vs. *Gay,* 86 Texas 571: 25 L. R. A. 52.

In Brown on Jurisdiction (2nd Ed., 1901), it is said at Section 32—"The following actions were local at common

law:—all actions for the recovery of real property or any interest therein, *or the enforcement of any lien thereon,* or the enforcement of the specific performance of a contract concerning the same where the property is claimed."

In Shiras' Equity Practice in U. S. Circuit Courts (2nd Edition), at page 22, it is said: "In cases which, from the subject-matter and the relief sought with regard thereto are local in their nature, the suit must be brought in the District wherein the property sought to be reached or affected is situated, and this rule is applicable to the class of cases named in the eighth section of the Judiciary Act of 1875, being those *brought to enforce a legal or equitable lien upon,* or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property."

In Bailey on Jurisdiction at Section 55 it is said:—"In proceedings *in rem* an appearance will serve to give jurisdiction over the person, but *it is not sufficient to confer jurisdiction over the proceedings or the res.*"

Where the Court has not jurisdiction over the subject-matter of the proceeding "the judgment ultimately rendered and all proceedings had thereunder are utterly void and open to repudiation in a collateral proceeding, as well as direct attack." * * * "Objection to jurisdiction over the subject-matter is always in time." Kleber on Void Sales, Section 54.

POINT 13.

The reservations in the void decrees of 1896 leave open the question of jurisdiction of subject matter and ultra vires, and made whatever title was claimed under them, subject and subservient to lack of jurisdiction of subject matter and ultra vires and such questions are still undetermined and are open to collateral attack.

Under this Point there will also be considered assignment of error XXI (see appendix, p. 79).

On the point of *ultra vires* estoppel, in *Ward* vs. *Joslin,* 186 U. S. 142, 46 Law Ed. 1093, at 1099, the court says:

"The rule in this court is that a contract made by a corporation beyond the scope of its powers, express or implied, cannot be enforced or rendered enforceable by the application of the principle of estoppel."

* * * * *

"Whether in this case the corporation would have been estopped if it had made the defense of *ultra vires,* it did not make it and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas Constitution (citing authority), but we did not there hold that it was not open for a stockholder to show that the judgment was not enforceable against him when rendered against the corporation on a contract beyond its power to make."

But in 1896 the Court did not pass on the question, but specifically reserved the points, and any mortgagees or purchasers took with notice thereof through the title papers. *Simmons Coal Co.* vs. *Doran,* below.

In *Texas & P. R. Co.* vs. *Pottorff,* 291 U. S. 245 at 260; 78 L. Ed. 777 at 786, the Court held and said:

"Second. The receiver is not estopped to deny the validity of the pledge. The Railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. *Neither branch of the argument is well founded.* The bank itself could have set aside this transaction. It is the *settled doctrine* of *this Court* that *no rights arise on an ultra vires* contract, even *though* the *contract* has been *performed;* and that this conclusion *cannot be circumvented by* erecting an *estoppel which* would *prevent challenging* the *legality* of a *power exercised. California Nat. Bank* vs. *Kennedy,* 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *McCormick* vs. *Market Nat. Bank,* 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433; *Central Transp. Co.* vs. *Pullman's Palace Car Co.,* 139 U. S. 24, 35 L. Ed. 55, 11 S. Ct. 478.

Note by the Court:

"See also *Pearce* vs. *Madison & I. R. Co.,* 21 How. 441, 16 L. Ed. 184; *Thomas* vs. *West Jersey R. Co.,* 101 U. S. 71, 21 L. Ed. 950; *Pennsylvania R. Co.* vs. *St. Louis, A. & T. H. R. Co.,* 118 U. S. 290, 30 L. Ed. 83, 6 St. Ct. 1094; *Oregon R. & Nav. Co.* vs. *Oregonian R. Co.,* 130 U. S. 1, 32 L. Ed. 837, 9 S. Ct. 409; *First Nat. Bank* vs. *Hawkins,*

174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739; *De la Vergne Refrigerating Mach. Co.* vs. *German Sav. Inst.,* 175 U. S. 40, 44 L. Ed. 65, 20 S. Ct. 20."

In *Ash Sheep Co.* vs. *United States,* 252 U. S. 159, and 170; 64 L. Ed. 507, affirming 250 Federal 591; 254 Federal 59, the Court at page 512 said: "It is also contended, far from confidently, that the recovery of nominal damages in the equity suit is a bar to the recovery of the penalty in the case at law. While the amount of the statutory penalty for the trespass was prayed for in the equity suit, yet the trial court, saying that equity never aids the collection of such penalties (*Marshall* vs. *Vicksburg,* 15 Wall. 146, 149, 21 L. Ed. 121, 122), and that no evidence of substantial damage had been introduced, limited the recovery to $1 and costs. *Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding.* We agree with the court of appeals that "a *judgment* is *not conclusive* of any question which, *from* the *nature* of the *case* or the form of action, *could not have been adjudicated in* the *case* in which it was *rendered*".

It results that the decree in No. 212 and the judgment in No. 285 must both be affirmed."

This is conclusive that the requirement of the decrees in 1896 that the Railroad Company execute deeds of assurance, was and is invalid and void or beyond the jurisdiction of the Court, and the deeds are likewise invalid and not an estoppel. They are likewise void under the principle of the Townsend case.

The decree confirming Special Master's Land Sales in 1896 recited: "Now come again all the parties by their respective solicitors, and comes also the *purchaser,* Northern Pacific *Railway* Company; and its petition that the several reports of Alfred L. Cary, the Special Master, heretofore filed herein, of the sales by him made of the lands and rights in respect of lands in and by the decrees herein directed to be sold, should be approved, and that the sale of said lands and *rights in respect of lands* of the Northern Pacific Railroad Company, briefly described in the notice of sale thereof, should be confirmed and made absolute, come on to be heard."

The United States was not a party to the suits but the United States held the title to "rights in respect of lands".

In *Simmons Creek Coal Co.* vs. *Doran,* 142 U. S. 417, 35 L. Ed. 1063, at 1072, the Court clearly states the rule that purchasers are required to take a notice of what is in the title papers as follows: "The rule is thus stated by the Virginia Court of Appeals, in *Burwell* vs. *Fauber,* 21 Gratt. 446, 463: 'Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat Emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a *bona fide purchaser.* He is bound not only by actual, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice.' *Jones* vs. *Smith,* 1 Hare, 43, 55; *Le Neve* vs. *Le Neve,* 2 L. C. Eq. *127; and *Brush* vs. *Ware,* 40 U. S. 15 Pet. 93, 114 (10:672, 680), are cited."

POINT 14.

By the second proviso of Section 3 of the Act of July 2, 1864 (13 Stats. 365), other railroad companies receiving grants can assign the same to the Northern Pacific Railroad Company or may consolidate, federate or associate with the Northern Pacific Railroad Company, but it is still to be the Northern Pacific Railroad company under this act, and the proviso does not permit the Northern Pacific Railroad Company to assign its grants to such other company or to be consolidated, federated, or associated into such other company so as to be absorbed by it. The statute giving authority one way and not mentioning it the other excludes the other way.

POINT 15.

The reservations in the so-called Plan, etc., of 1896, in the Voting Trust and in the mortgages of the railway company, estop all parties to claim that any title or right of possession ever passed from the railroad company.

Points 14 and 15 will be considered with assignments of error XIII and XVII (see appendix, pp. 75, 77).

The fake foreclosure of 1896 was invalid and void as to the railroad property and stock securities in the State of *Minnesota,* and the *railway company* and railroad company are *estopped* to *deny* such *invalidity* thereof *by Pearsall* vs. *Great Northern Railway Company,* 161 U. S. 646; 40 L. Ed. 383, where the Court found and determined: "This was a bill in equity filed by Pearsall, a stockholder in the Great Northern Railway, against the company, which is a corporation created and existing under the laws of the territory and state of Minnesota, and a citizen of that state, to enjoin it from entering into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgages of the Northern Pacific Railroad Company, under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase or cause to be purchased, the property and franchises of the Northern Pacific Railroad Company."

The Court there held that an arrangement by which a railroad company in return for a guaranty, turns over to a trustee for the entire body of stockholders of another company owning a parallel road one-half of its stock, with an agreement contemplating an interchange of traffic and the use of terminal facilities, and with the almost certainty that the complete control of the former will be obtained by the latter company—is in violation of a law prohibiting railroad corporations from consolidating with, leasing, or purchasing, or in any other way becoming the owner of or controlling, *a parallel or competing line.*

In *Oregon Railway & Navigation Company* vs. *Oregonian Railway Company,* 130 U. S. 1; 32 L. Ed. 837, the Court stated: "It is strenuously argued, and with some degree of plausibility that the language of this proviso and the use of the words *'successors'* and *'assigns'* in other statutes, which are referred to, imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, *it is not precisely the form in which we would expect to find a grant of the power to sell,*

to *lease,* or to *transfer* the title, ownership or *use of railroad* lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another.

"One of the *most important powers* with which a corporation can be invested is the *right to sell out its whole property,* together with the franchises under which it is operated, or the authority to *lease* its property for a long term of years. In the case of a railroad company *these privileges, next* to the *right to build* and operate its railroad, would be the *most important which could be given it,* and this idea would impress itself upon the Legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the Legislature saw fit to confer such rights *it would do so in terms which could not be misunderstood.* To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word *'assigns', a very loose and indefinite term,* is a stretch of the power of the contract in making implications which we do not feel to be justified."

(See further quotation under Point 10.)

In *Northern Pacific Railway Company* vs. *Townsend,* 190 U. S. 267; 47 L. Ed. 1044, the Court said: "To repeat, the right of way was given in order that the obligation to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained." (For further quotation see Point 7.)

In *Louisville Trust Co.* vs. *Louisville N. A. & C. R. Co.,* 174 U. S. 674; 43 L. Ed. 1130, the Court said: "Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of a mortgagor, the mortgagor and mortgagee can enter into an agreement by which through the form of equitable proceedings all the right of this unsecured creditor may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated." (See further quotation in Appendix, p. 62.)

All the other cases cited and quoted under Point 10 are equally applicable here.

POINT 16.

That neither in 1896 nor at any other time did the railway company have ability, power or authority to receive by deed, lease or other contract, the railroad properties, assets and lands of the Northern Pacific Railroad Company in any of the states traversed by the lines of the said railroad company.

This Point will be considered with assignment of error XVII (see appendix, p. 77).

The decisions cited and quoted under Point 10 and other points sufficiently sustain this point.

That the railway company could not take over a parallel line is because its statute sections 1788 and 1833 and other sections, which prohibit same.

In *Pearsall* vs. *Great Northern Railway Company,* 161 U. S. 846; 40 L. Ed. 383, the Court held that under a Minnesota statute similar to the Wisconsin Act that a Minnesota Railroad company could not take control of the Northern Pacific Railroad Company because the latter was a parallel line.

In *Case* vs. *Kelly,* 133 U. S. 21; 33 L. Ed. 513, the Supreme Court found and determined that a Wisconsin railroad corporation had no authority under the laws of that State to receive an indefinite quantity of lands whether by purchase or by gift for use in the construction with no limitation upon their use or upon their sale, but that such railroad company is limited to the lands necessary to such use as are appropriate to the operation of its railroad, being its right of way, terminals and stations.

The laws construed in *Case* vs. *Kelly* were the *same* ones in effect in 1896 and the Court stated: *"It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this Company or any other corporation to purchase and hold lands indefinitely,* as an individual could do, without regard to the uses to be made of such real estate. The *charter* of the Company, approved April 12, 1866, chapter 540, authorizes it to acquire real estate, namely, the fee simple in lands, tenements and easements, for their legitimate use for railroad purposes. *It is thus authorized* to take lands 100 feet in

width for right of way, and also such as is needed for depot buildings, stopping stages, station houses, freight-houses, warehouses, engine-houses, machine-shops, factories and for purposes connected with the use and management of the railroad. *This enumeration of the purposes* for which the corporation could acquire title to real estate *must necessarily be held exclusive of all other purposes,* and as the court said at the time of making its interlocutory decree, *'it was not authorized by its charter to take lands for speculative or farming purposes'.*

"It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation *to receive an indefinite quantity of lands,* whether by purchase or gift, *to be converted into money* or held for any *other* purpose *than those mentioned in its Act of incorporation."*

It was contended in this case that the court could not decide the question but it would have to be raised by a writ of *quo warranto,* but the Court held and said: "It has no authority by the Statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a *court might hesitate* to declare the title to lands received already, and in the possession and ownership of the Company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the Company in violating the law, and enabling the Company to do that which the law forbids."

The Court held that it would assist in taking away from the railroad company rights and property already obtained by *ultra vires* acts in the Oregon Railway & Navigation case above.

Congress knowing of these decisions, by not repudiating them by the terms of the Act of June 25, 1929, made it obligatory on the Courts to read them into this Act as it amended the Act of July 2, 1864.

In the suit at bar the railway company is not only seeking to retain lands to which it claims to have obtained the title from the railroad company, but is also seeking

other lands or the value of same, in which the title is still in the United States and has not passed to either the railroad company or the railway company and title to which the railway company cannot receive, take or hold under the laws of Wisconsin, Minnesota and the other states traversed by the Northern Pacific Railroad Company system.

Case vs. *Kelly* and Oregon Railway Company case are authority that lands can be recovered from a railway company which took same without authority to receive same and that *Quo Warranto* is not necessary or proper: furthermore, the statute of 1929 as indicated by the Report of the Committee gives a specific and special remedy to do so in this suit and makes it mandatory on the Court and the Attorney General to enforce same.

POINT 17.

The Northern Pacific Railway Company, the so-called Wisconsin corporation, was never legally organized, nor became operative under the Wisconsin laws and so far as it illegally proceeded and attempted to organize and issue stock, practically all of its stock was owned by and belonged to the railroad company in 1896 and between 1873 and 1883 the railroad company absorbed and took over the route and unfinished work of the railway company and completed same into Superior, Conner's Point and Rice's Point in its own name and made same part of its system.

This Point will be considered with assignment of error XVII (appendix, p. 77).

A map showing the 3 miles of railroad at Walbridge, built in July, 1896, by the Railway Co.—the only railroad ever built by the Railway Co.—and showing the line built by the Railroad Co. into Superior to Connor's Point and to Rice's Point is in the front of the Appendix.

Much of the history of the Railway Company applicable to this Point is set out in the statement of the case (p. 6 above) and more of the history of the building of the line from Thompson's Junction through Superior to Connor's Point and Rice's Point is set out in the Act

of Congress of February 27, 1873 (17 Stats. 477; set out in Appendix, p. 1), and in *Roberts* vs. *N. P. R. R. Co.*, 158 U. S. at 15, 39 L. Ed., at 878, where the Court said: "There is no room for doubt that the railroad company was legally competent to receive a grant of lands, to enable it to construct and maintain its road. The Northern Pacific Railroad Company was organized under and by virtue of the Act of Congress, approved July 2, 1864, entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Pugent Sound, on the Pacific coast, by the Northern Route', in which Act it was, among other things, provided that 'the said company is authorized to accept to its own use any grant, donation, power, franchise, aid, or assistance which may be granted to or conferred upon said company by the Congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistance, to its own use for the purpose aforesaid'. And by an act of the legislature of the state of Wisconsin, approved April 10, 1865, the company was, for the purposes set forth in said Act of Congress and to carry the same into full effect, vested with all the rights, powers, privileges, and immunities within the limits of the said state of Wisconsin, which were given by said Act of Congress within the territorial jurisdiction of the United States.

In September, 1880, the railroad company, having theretofore constructed its railroad and telegraph line to a point in the state of Minnesota, was about to select the point or points on Lake Superior to which their said line should be extended. In this condition of affairs the authorities of the county of Douglas, desiring to secure extension of the railroad through their territory, and the establishment of a lake terminus within the same, made a proposal to the company to transfer by sufficient deed or deeds to the company all the alienable lands or lots belonging to the county which had been acquired by deed, to which the county had held undisputed title for more than two years, if the company would construct their road upon a route desired by the county and establish a terminus, with sufficient docks, and piers suitable for the transfer of passengers and freight from the railroad cars to and from lake-going craft, within the limits of the county.

"This proposal was accepted by the railroad company, and a contract to that effect was entered into between the parties, and, in pursuance thereof, the railroad company, during the year 1881, *constructed and equipped its line of railroad upon the route selected by the county,* and built the docks and piers and other structures *called for by the contract,* expending in so doing the sum of about $740,000. *On January 16, 1882, the county board by a resolution,* reciting that the railroad company had complied with the terms of the contract and had performed its part thereof, authorized the execution of the proper deeds; and thereupon a deed was executed and delivered to the railroad company, conveying, among other lands, those in dispute. This deed, was, on the same day, duly recorded in the office of the Register of deeds of Douglas county. Ever since the company has maintained and operated its road and wharves, and has paid and the county has received annual taxes, amounting to about five thousand dollars." (This Resolution is in Appendix, p. 7.)

"By an Act, approved *March 23, 1883,* the legislature of the state of Wisconsin enacted as follows: 'Any conveyance heretofore made by the county of Douglas to the Northern Pacific Railroad, under and in pursuance and satisfaction of resolutions of the county board of said county, dated September 7, 1880, is hereby declared to be valid and effectual to vest in the Northern Pacific Railroad Company the title to the lands conveyed or attempted to be conveyed by such conveyance; and any assignment of tax certificates heretofore made to the said railroad company, upon the property, or any thereof, embraced in or conveyed by said conveyance, pursuant to and in satisfaction of and in compliance with said resolutions, is hereby declared to be valid.' (Section 2 of this Act is in the Appendix, p. 9.)

Thereafter the railroad company sold and conveyed, for value, portions of these lands to third parties."

* * * * *

"There is a second important feature that distinguishes this case from those relied on by the plaintiffs in error, and that is the character of the railroad company, as a corporation created for public and national purposes. The Wisconsin courts were dealing with corporations of their own state, and they *went upon the proposition* that the *construction* and *maintenance of railroads did not constitute a public purpose, because* the corporations created

to build and run railroads *were strictly private corporations formed for the purpose of private gain.* If the making and maintaining a railroad in Wisconsin by a state corporation was not a public use, it was thought to follow that such an enterprise could not receive municipal aid. *And it may be conceded that, when we are called upon to pass upon the legal rights of a Wisconsin railroad company, we should follow the law laid down by the state courts.* But the *question now* arises *whether* such a proposition is *applicable to the case of a corporation created by a law of the United States, and subjected by its charter to important public duties.*"

* * * * *

"By an Act approved April 10, 1865, the legislature of the state of Wisconsin declared that, *for the purposes set forth in said Act of Congress, and to carry the same into full effect, the Northern Pacific Railroad Company was vested with all the rights, powers, privileges, and immunities within the limits of the state of Wisconsin* which were *given by said Act of Congress.* (This Act and the amendment thereof of March 10, 1870, and March 25, 1872, are in Appendix, pp. 4 and (A).)

"It is obvious that the effect of this legislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, and *subject, in important respects, to the control of Congress.* That portion of its road that lies within the state of Wisconsin is of the same public character as the portions lying in other states or territories. Whatever respect may be due to *decisions* of the courts of *Wisconsin defining the character and powers of Wisconsin corporations* owning railroads, the scope of those decisions *cannot be deemed to include* the *case* of a *nation highway like that of the Northern Pacific Railroad Company.* All of the great transcontinental railroads were constructed, under Federal authority, through territories which have since become states. Such states are possessed of the same powers of sovereignty as belong to the older states. *Hence, if the contention were true that the state of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders of its national character, and declare the Northern Pacific Railroad Company to be a private corporation* not engaged in promoting a *public purpose* the same would be true of the other states through which the road passes. *Such a contention,* we think, *cannot be successfully maintained.*"

The decision in *Williams* vs. *Southern New Jersey R. R. Co.,* 26 N. J. Equity 398, is ample authority that the conduct of the parties here was sufficient to work a consolidation even though no formal agreement of consolidation was recorded with the State authorities. *Cox* vs. *Midland Railroad Company,* 31 N. J. Equity 105, held a railroad company may lose its location by allowing another railroad to use and occupy the land included in such location.

N. P. R. R. Co. vs. *Smith,* 171 U. S. 261; 43 L. Ed. 1047, quoted cases including Roberts case above to the effect that where a railroad company builds its line on route of another railroad or land of others without objections that the building railroad thereby takes title to such land or route.

POINT 18.

The so-called Amendments of the Charter of the Railway Company in 1895, 1896 and 1897 and so-called Acts of the Wisconsin Legislature in those years and later ones seeking to bolster up the Railway Company indirectly where it could not do so directly, are each and all unconstitutional, null and void, and are also invalid and of no effect against the rights of the Railroad Company; and appellants under the Constitution and Statutes of the United States and decisions of the Supreme Court of the United States.

This Point will be considered with assignment of error XVII (Appendix, p. 77).

The railroad company was the owner of and there was outstanding in its name 3,800 shares of the 3,844 shares of outstanding stock of the railway company at the meeting of August 31, 1880, and the 3,800 shares were voted and 12 other shares were voted, the other 32 not being voted.

At the meetings of October 16, 1895 (claiming to ratify the amendment of April 15, 1895), and July 1, 1896, the *3,800 shares* of the stock of the railway company belonging to the railroad company were in the custody and possession of John C. Spooner, who took part in said meetings, who was attorney for the said railroad company and

for the receiver of the said railroad company, and who had received the 3,800 shares of stock as such attorney from the First National Bank of Madison, Wisconsin, on May 23, 1895, for and on behalf of the said railroad company.

The remaining 44 shares of stock of the Superior and St. Croix Railroad Company, which was afterwards changed to the Northern Pacific Railway Company, was bought up by officers and officials of the railroad company through Hiram Hayes, attorney for the railroad company with its funds and for its benefit and at the said so-called stockholders' meeting of the railway company of October 16, 1895, and July 1, 1896, the railroad company was the owner of all of the stock of the said railway company, and at such meeting officers and officials of the railroad company were elected officers and officials of the railway company: all of the stock voted at said meetings was voted by Spooner, his secretary, Reed, and his partner, Sanborn.

The foregoing action of the officials of the railroad and railway companies in voting the stock of the railway company, which was owned by the railroad company, was illegal, unlawful and condemned by the principles decided in the case of *Wardell* vs. *Union Pacific Railroad Company,* 103 U. S. 651; 26 L. Ed. 509.

The *amended Wisconsin Constitution* of 1871 provides: "The Legislature is prohibited from enacting any *special* or *private* laws in the following cases:

* * * * *

7th. For granting corporate *powers* or *privileges* except for cities."

This Constitution doesn't just prohibit amendment of charters but prohibits all "special or private" "corporate powers or privileges", using the word "or" twice, thus disjoining "special" and "private" and also "powers" and "privileges". Authority permitting stockolders to increase the railway company stock from $5,000,000 to any amount without limit and they increased it to $155,000,000 was a "corporate power" granted and not just a "privi-

lege'' as *Chicago City Ry. Co.* vs. *Atherton,* 18 Wall. 233; 21 L. Ed. 902, determined that an increase of capital is *''organic and fundamental''.*

The original charter of March 15, 1870, only authorized the building of a railroad from a point on the west shore of the Bay of Superior or the south shore of the Bay of St. Louis in Douglas County, Wisconsin, through several other counties, ''to such a point'' on the Minnesota boundary north of the Nemadji River as might be deemed advisable, which was purely an intrastate road. The so-called amendment of April 15, 1895, authorized the building of a road not only as set out in the orignal charter, but to build it to points in Michigan and on to the Pacific Coast and to St. Paul, Minnesota, and Chicago, Illinois, thus making it an interstate railroad.

This was such an increase of the powers, rights and functions as were forbidden by the Constitution and denounced by the Supreme Court of Wisconsin in the case of *Black River Improvement Company* vs. *Halway,* 87 Wis. 584; 59 N. W. 126.

The amending act of April 4, 1895, added Sections 14, 15 and 16 to the charter as follows:

''Sec. 14. The said company shall, *in addition to the special powers,* conferred upon it *by said Chapter 326, and by this act,* have, possess, and enjoy all of the rights, powers, privileges, and immunities conferred upon railroad corporations by Chapter 87, of the Revised Statutes of 1878, and the acts amendatory thereof and supplementary thereto, and shall be subject, save where inconsistent herewith, to the restrictions, duties and liabilities imposed upon railroad corporations by said chapter, and all amendatory and supplementary acts.

''Sec. 15. Sections 13, 14, 15, 16, 17, 18 and 19 of said chapter 326 are hereby repealed.

''Sec. 16. All acts and parts of acts inconsistent with, or in any manner contravening, the provisions of this act are hereby repealed.''

Section 14 by its own terms recognizes and states that the *amendment* granted *''special powers''* in addition to the *''special powers''* in the *Charter.*

These amendments granted, as the Court in the Mylrea case stated, "The increased or added rights, powers and franchises", which are unconstitutional, invalid and void; such increase or added powers cannot be granted as an amendment to a charter by special act of the legislature, as determined by the Supreme Court of Wisconsin in *Black River Improvement Company* vs. *Halway,* 87 Wis. 584; 59 N. W. 126, which held that the Constitution of 1871 limited the power to amend to extend the life of the corporation but there could not be an amendment which increased the rights and powers of the corporation.

This 1895 Amendment was such an increase of the powers, rights and functions forbiddon by the Constitution and contrary to the decision in *Black River Improvement Company* vs. *Holway,* 87 Wis. 584; 59 N. W. 126.

At a meeting of the stockholders of the Superior and St. Croix Railroad Company, held July 1, 1896, a resolution was passed as follows:

"RESOLVED, That the corporate name of this corporation be, and the same is hereby, changed from 'The Superior and St. Croix Railroad Company' to 'Northern Pacific Railway Company' which latter name is hereby adopted as the corporate name of this corporation."

There was no authority in the amendment for this change of name.

After the above amendment of the legislature of April 15, 1895, the question arising as to whether or not the corporation was not dead and abandoned for non user and the amendment for that reason was invalid, the Superior and St. Croix Railroad Company had the Attorney General of Wisconsin file a friendly petition for a writ of *quo warranto* to see whether or not the charter had been lost by abandonment, non user and failure to have meetings and whether or not it could be amended by a special act, as the Constitution had been changed forbidding the incorporation of companies by special act. The petition was heard and decided by the Supreme Court in the case of *Mylrea, Attorney General,* vs. *Superior and St. Croix Railroad Company,* 93 Wis. 604; 67 N. W. 1138, in which the

Court held on June 19, 1896, that the charter had not been abandoned by a failure to hold meetings or to carry on any work. The Court specifically refused to pass on the question of whether or not the amendment was not *ultra vires* and invalid and implications from its languages are that the Court thought that the amendment of 1895 was invalid and *ultra vires* because of the increased or added rights, powers and franchises, for the Court stated: "As to the increased or added rights, powers, and franchises under Chapter 244 (1895), the information does not allege that the defendant has used or exercised any of them. There is nothing to show that the company has done any act that it might not lawfully have done under its original charter. The information is the foundation of the jurisdiction of the court, and it cannot be aided by the very general and uncertain statement filed by the defendant that it 'is exercising and intends to exercise, the privileges, rights and franchises conferred upon it * * * by the amendatory act of 1895, and to acquire, by purchase, construction and otherwise, the railroads and genral routes designated in that act, and to operate the same within and without the state, and to issue its stock and bonds thereon, as authorized by said act'. An information in the nature of *quo warranto* cannot be maintained against a corporation from what it may intend or threaten to do. This information does not present any actual practical question in these respects for the judgment of the court, and no judgment of exclusion could possibly be framed upon such allegations. For these reasons, the *court cannot* consider them, or *enter upon the question* of the *validity of the act of 1895,* referred to. The motion for leave to file an information and for process is denied."

Union Trust Co. vs. *Bennett, et al.,* 169 Ind. 346, 82 N. E. 782. By act of 1832 company was allowed a capital stock issue of $100,000. An act of 1873 which amended the 1832 act and provided that the capital stock could be increased by additional sums from time to time as may be determined by a vote of the majority in value of stockholders. Court held that the General Assembly should not be empowered, under the State Constitution, by a special law, to alter an existing charter in such a manner as, *in effect, to make a new corporation;* and that the undertaking

of a subscriber under this act, is a *nudum pactum.* The change in the amount of a corporation's capital stock is a fundamental change and not authorized without legislative authority.

Court also held that in an action by a receiver of an insurance company for subscriptions on unpaid stock, evidence required a finding that the subscription was for stock issued under an unconstitutional statute, and not for the valid stock which the corporation was originally authorized to issue.

In *Marion Trust Co.* vs. *Bennett,* 82 N. E. Rep. 782, the Court held and said: "A *change* in the *amount of the capital* stock of a corporation, like a change in the objects thereof, *is fundamental,* and *cannot* be *made without clear legislative authority. Railway Co.* vs. *Allerton,* 18 Wall. (U. S.) 233, 21 L. Ed. 902; *McNulta* vs. *Cornbelt Bank,* 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 204; Note to *Peck* vs. *Elliott,* as reported in 38 L. R. A. 616; Clark on Corporations (2d Ed.) 346. What, then, shall be said of a special act *which attempts to change a corporation of limited capital stock to one in which the whole matter of the extent of the capital stock is left to the stockholders?* It is clear, in our opinion, since the corporation in question was limited to $100,000 capital by the act of its creation, that the provision of the act of 1873, whereby there was attempted to be conferred upon the association the capacity of infinite growth, *so that it might bulk with the largest of corporations, was unconstitutional* and void, as an attempt to create an insurance corporation by special act. The undertaking of a subscriber to the capital stock of a corporation must find a correlative in the capacity of the corporation, if it be a going concern, to deliver such stock, and, if the association be without capacity in that behalf, the undertaking of a subscriber is a *nudum pactum.*"

In *Chicago City Railway Co.* vs. *Allerton,* 85 U. S. 233, 21 L. Ed. 902, the Court held and said: "The decree must be affirmed on the broad ground that a *change so organic* and *fundamental as* that of *increasing* the *capital stock* of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto."

Scoville vs. *Thayer,* 105 U. S. 143, 148, 26 L. Ed. 968.

Bank vs. *R. R.,* 13 N. Y. 599.

Neither the railroad company nor its property or stock could be taken, received or held by the railway company without the consent of the United States, even if the railway company had authority to so take, hold and receive it, which latter authority is denied.

The title to this railroad, telegraph line and land grant is now claimed by the Northern Pacific *Railway* Company, a *Wisconsin* corporation, incorporated in 1870 to build a local line of railroad entirely and solely within Wisconsin.

Under the Wisconsin law and decisions railroad corporations chartered in that State are deemed strictly private and local corporations, formed for purposes of private gain.

The distinction between such Wisconsin corporations and the Northern Pacific *Railroad* Company and the facts both are determined and found by the Court in *Roberts* vs. *Northern Pacific R. R. Co.,* 158 U. S. 1; 39 L. Ed. 873 (April 22, 1895), where, after quoting from the Congressional Charter Act of 1864 as to the declared public purposes for which the latter corporation had been created, the U. S. Supreme Court said: "It is obvious that the effect of this elgislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, *and subject, in important respects, to the control of Congress.* That portion of its road that lies within the State of Wisconsin is of the same public character as the portions lying in other States or Territories. Whatever respect may be due to decisions of the Courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisons cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company. All of the great transcontinental railroads were constructed, under Federal authority, through Territories which have since become States. Such States are possessed of the same powers of sovereignty as belong to the older States. Hence, if the contention were true that the State of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders to its national character, and declare the

Northern Pacific Railroad Company to be a private corporation not engaged in promoting a public purpose, the same would be true of the other States through which the road passes. Such a contention, we think, cannot be successfully maintained. * * * We think, therefore, that when the Circuit Court of the United States for the District of Wisconsin was called upon, in the present case, to pass upon the character, powers and rights of the Northern Pacific Railroad Company, it was bound to regard that company as a corporation of the United States created for national purposes, and as a means of interstate commerce and not to apply to it the views of the Wisconsin Courts pertaining to their local railroads.

"Upon the principle of these cases it is obvious that the *state of Wisconsin* at least after it had given its consent to the Northern Pacific Railroad Company to enter into its territory and construct its road, and such consent had been acted on, *could not by hostile legislation, hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national* legislation for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations."

John C. *Spooner* was *attorney* for the railroad company in this case.

There was no authority in the Act of Congress of 1864 for the transfer of the properties or the stock of the railroad company as it was transferred and juggled in 1896 nor was there any authority in the Act of Wisconsin for the railroad company to take and receive same. The invalid and illegal amendment of the charter of the railway company of April 15, 1895, did not empower or authorize the railway company to take or receive same—this amendment was approximately six months before there was any authority for the amendment to be sought or obtained, as there was no meeting of the railway company from August 31, 1880, until October 10, 1895, which latter meeting was illegal and void.

Any contention that the deposits were on the railway company stock is contrary to the Wisconsin statute, Section 1751, in force in 1896 which provided as follows:

"No corporation shall issue any stock or certificate of stock except in consideration of money, or labor or property estimated at its true money value, actually received by it equal to the par value thereof," etc.

On April 18, 1899, on appeal of those interested in sustaining the reorganization for the Northern Pacific Railway Company this Section 1751 was amended by adding thereto this proviso, which is null and void as *attempting indirectly to amend* the railway company *charter* to give powers which could not under the Constitution be done directly:

"Provided that nothing in this section contained shall apply to any issues of stock or of bonds heretofore or hereafter made by any railroad corporation in accordance with any plan of reorganization adopted by the holders of the greater amount of the bonds, or of the stock of any insolvent railroad corporation whose railroad wholly or partly within this state, has been sold or hereafter shall be sold at mortgage sale, or in bankruptcy or at other judicial sale and acquired by the railroad corporation making such new issue of stock or of bonds or of both; and any and all such issues heretofore made in conformity with any such plan of reorganization are hereby legalized, ratified and confirmed."

A void and unconstitutional amendment of Section 1788 of the revised statutes of Wisconsin relative to reorganization of corporations was likewise obtained by the same parties on April 18, 1899; the Act is in Appendix, p. 41.

This void amendment seemingly fails to authorize the purchase of property or stock of a foreign or Federal Corporation, as it seems limited to corporations exsiting under laws of Wisconsin as it does not mention corporations of other States, but does mention property located in other States, and the amendment is prohibited from applying to or affecting the railroad company by *Roberts* vs. *Northern Pacific Railroad Company,* 158 U. S. 1; 39 L. Ed. 873.

Mentioning in the act corporations of Wisconsin, and not mentioning corporations of other states or Federal Corporations, or foreign corporations excludes all but Wisconsin corporations under the well known maxim that naming one excludes the other; furthermore permitting

purchase of railroad property in other states without stating it may belong to a corporation of other states, likewise excludes the purchase of such property when owned by a corporation of another state.

The railroad company was not insolvent as its officials were paid in stocks and securities $203 per share of par value of $100, and it was agreed that this $345,000,000 was the actual value of the railroad properties sold; the statute is limited to purchase of property of *insolvent railroad corporations;* the allegations in the bill in the Winston suit were that the property at a sale would bring more than the debts and stock—of course it meant a fair sale and not the fraudulent collusive so-called sale that officials went through with.

The act as in effect in 1896 and as amended forbids any such arrangement between companies whose *lines are parallel,* and the only line the Railway Co. had was the three miles built between July 1 and 12, 1896, not parallel to, but actually on the right of way of the railroad company at Walbridge (R., ...).

This act is unconstitutional under Art. 4, Sect. 31, Subd. 7 of the Wisconsin Constitution as granting powers by special act, and this was as alleged a special act for a special corporation, the railway company.

It is also unconstitutional under Art. 4, Sect. 18, of said Constitution as it embraces more than two subjects in one act, and the subjects are not expressed in the title of the act.

The Reorganization Managers, Syndicate Members, officials and directors of the railroad and railway companies and others associated with them in their schemes and plans known as the Reorganization Proceedings and fake foreclosure of 1896, which were conducted for their own personal profit, benefit and aggrandizement, having difficulty with the titles and being advised of the defects and lack of legislative authority in the said proceedings, sought and secured an amendment April 22, 1897, and another amendment April 4, 1899, of Section 1833 of Wis-

consin laws by the Legislature of Wisconsin, which acts in effect were, and were intended to be, amendments of the charter of the railway company and an increase of its powers and rights and to apply only to the railway company. They were and are absolutely null and void and in contravention of the Constitution of Wisconsin and in contravention of the principles declared binding on and as to the railroad company in *Roberts* vs. *Northern Pacific Railroad Company,* 158 U. S. 1; 39 L. Ed. 873.

The said act set out in full in the appendix (page 38) shows clearly that it is in violation of Article 4, Section 18 of the Constitution because it is a private and local act passed especially for the railway company and, as alleged, was an indirect effort to amend the charter of the railway company to give it all the rights of the railroad company, and it has more than two subjects and none of the subjects are given in the title. The very attempt to give a corporation all the power of another corporation, from which it takes a conveyance or lease is clearly an amendment of the charter powers of the purchasing corporation and is invalid under Article 4, Section 31, Subd. 7, of the Wisconsin Constitution above (R., 1131).

It will be noted that such purchase is prohibited by parallel roads and the act also requires that there must be a connecting continuous main line, which makes it inapplicable here as the only line the railway company owned at the time of the so-called reorganization was the three miles built at Walbridge on the right of way of the railroad company and parallel to it and in no way a connecting line, and if it hauled any freight or passengers, it would be a competing line for the three miles.

The railway in its effort to try to make the 1896 so-called proceedings and foreclosure hold water obtained an invalid amendment of Section 1833 on April 22, 1897, Chapter 294, but finding that it would not protect them, they sought and obtained the invalid amendment of April 18, 1899.

The last provision of Section 1 in the above Act—against parallel lines—was in Section 1833 in 1896.

On July 1, 1896, the railway company did not own or was not operating any railroad, but between July 1st and its reorganization agreement of July 13, 1896, and the foreclosure on July 25, 1896, the railway company built the *three mile line described* below from the Minnesota State line east into and through the town of Walbridge, which was parallel to the railroad's track and on the right of way and land of the railroad company.

Appellants are advised by Wisconsin attorneys and it seems clear that the Wisconsin Acts of 1897 and 1899 amending Sections 1751, 1788 and 1833, are invalid and void as contrary to the Wisconsin Constitution, Article 4, Section 18, which forbids any private or local act containing two subjects and they must be set out in the title of the Act.

The Wisconsin Constitution, Article 4, Section 18, is as follows: Private and Local bills. Sec. 18. No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title (R., 1129).

An act which provided that escheats in Milwaukee County should go to the county, and later an amendment providing that said escheats go to the Milwaukee County Orphans Board was a local act, and the purpose of the act not being expressed in the title, the act was void. It is limited in its effect to a single county. It is, therefore, local in character and this brings it within the preview of the constitutional provisions. Estate of Bulemicy, 212 Wis. 426, 249 N. W. 534.

Chapter 257, Laws of 1933, entitled, "An act to amend sub-section 1 of Section 15 of Chap. 549, Laws of 1909, as amended by Chapter 300, Laws of 1929, relating to the civil court for Milwaukee County", purporting to transform such court from a municipal court into an inferior court, by providing that its summons may be served in any county of the state, is invalid because the subject of

the bill was not expressed in the title. *State ex rel. Schenider* vs. *Midland I. & F. Corp.,* 219 Wis. 161, 262 N. W. 711.

Act entitled as an act to amend act relating to distribution of taxes, which amendatory act applied only to counties of over 500,000 population and hence applied only to Milwaukee County, held unconstitutional for failure to express subject of act in title, since act was local, in that special charter of Milwaukee County included in classification created a situation which made passage of act necessary, which could not exist in any other county. *Whitefish Boy* vs. *Milwaukee County,* 271 N. W. 416.

POINT 19.

All so-called 1896 proceedings and agreements are void because of the infidelity of directors and officials of both the Railroad Company and Railway Company.

The directors of the Railroad Co. were directors of the Railway Co. and as set out in Statement of the Case reaped a fortune as members of the Syndicate and otherwise at the expense of stockholders of Railroad Co. by this fraud and deceit.

In *Geddes* vs. *Anaconda Copper Mining Co.,* 254 U. S. 590, 65 L. Ed. 425, 432, reversing 245, Fed. 225—(C. C. A.—9), the court held and said:

"The relation of directors to corporations is of such a fiduciary nature that transactions between boards havcommon members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transaction is challenged, the burden is upon those who would maintain them to show their entire fairness; and where a sale is involved, the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is *founded in soundest morality,* and *we now add, in the sound-*

est business policy. Twin-Lick Oil Co. vs. *Marbury,* 91 U. S. 587, 588, 23 L. Ed 329, 330, 3 Mor. Min. Rep. 688; *Thomas* vs. *Brownville, Ft. K. & P. R. Co.,* 109 U. S. 522, 27 L. Ed. 1018, 3 Sup. Ct. Rep. 315; *Wardell* vs. *Union P. R. Co.,* 103 U. S. 651, 658, 26 L. Ed. 509, 511, 7 Mor. Min. Rep. 144; *Corsicana Nat. Bank* vs. *Johnson,* 251 U. S. 68, 90, 64 L. Ed. 141, 155, 40 Sup. Ct. Rep. 82.

Jackson vs. *Ludeling,* reported in 88 U. S. 616, 22 L. Ed. 492, 495, is a clear ruling *on infidelity of directors of* Railroad corporation in which facts and acts of directors are somewhat as in the case at bar, to-wit:

"Their bill is filed as well for themselves as for all other bondholders whose situation is similar to theirs. *Some of them are also preferred* stockholders of the Company to a large amount. The mortgage was made by an authentic Act on the first day of September, A. D., 1857, to John Ray or bearer, to secure the full, faithful and punctual payment and redemption of each and all the bonds issued under it to any and all the future holders thereof, and to each and every one of them when the same should become due and payable, together with the interest accruing thereon. The *relief* sought by the bill is, that the *mortgage* may *be declared* to be a *valid lien* upon all the property described therein; *that* a *sale* averred to have been *made under it in 1866* to the defendant Ludeling and his associates may *be set aside,* and the *deed* made to them by the Sheriff may *be declared* to be *fraudulent and void,* that the defendants may be enjoined against setting up any title under the sale in the deed prohibited from selling any of the property, rights and privileges of the Railroad Company, and required to account for all money received by them on account of the corporation, and that mortgaged property may be decreed to be sold for the benefit of the bondholders, the preferred and other stockholders. The bill also prays for the appointment of a receiver and for other relief.

* * * * * *

And the situation of the other defendants is little if any better. John Ray, Joseph F. McGuire, John C. Mc-

Guire, Christopher H. Dabbs, Wesley J. Q. Baker, Robert Ray and Henry M. Bry were directors of the Railroad Company when the executory process was sued out, and when the sale was made. Bry was the vice-president and acting president, in consequence of the absence of the president, who was in Georgia. Joseph McGuire was the Company's secretary and treasurer. All these parties were at hand, residents in or near Monroe. As officers of the Company they had the custody and charge of the railroad and all the property of the corporation. And they held it in a very legitimate sense as trustees. Certainly they were the *trustees of the stockholders,* and also, to a considerable degree, of the *bondholders,* owners of the mortgage. We do not say they might not have purchased the property at a sale over which they had no control, and made under judicial process adverse to the Company. Perhaps they might. But we do say they had no right to join hands with Gordon. They had no right to enter or participate in a combination, the object of which was to devest the Company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. *They had no right to see their own profit at the expense* of the Company, *its stockholders, or* even its bondholders. Such a course was forbidden by their relation to the Company. It was their duty, to the extent of their power to secure for all those whose interests were in their charge the *highest possibly price for* the *property which could be obtained* for it at the *Sheriff's sale.* They could not rightfully place themselves in a position in which their interests became adverse to those of either the *stockholders* or bondholders. And this rule was peculiarly applicable to these defendants. On the 11th of October, 1865, only about two and a half months before Gordon instituted his proceedings to effect a sale of the road, the directors had resolved that, "In pursuance of resolutions passed by a meeting of the stockholders held on October 2d, the president of the Company be appointed to make arrangements with any company who, in his judgment, might be able to put the road in repair, which was theretofore in

operation, and complete the balance of the road, 'and pay the debts of the company;' and, if such arrangements could be made, that the same be reported to the directors, and upon their approval, that such steps should be taken as might vest the road, its franchises and other property in such Company.'' One of the purposes of this resolution was the payment of the debts of the Company. How, then, can it be claimed that directors who had thus resolved, in obedience to the instructions of the stockholders, were at liberty to participate in a *scheme,* the object and effect of which was to devest the Company of all its property and franchises without the payment of its debts? How can they be permitted to join hands with those who sought to obtain that property at the lowest price, *whose interest it was to have no other bidders than themselves at the sale,* and *whose action tended to defeat the avowed object of the resolution passed by the directors, as well as to make worthless the security which it was their duty to protect* and render in the highest possibile degree fruitful?

* * * * * *

A sale may have ben conducted legally in all its process and forms, and yet the purchaser may have been guilty of fraud, or may hold the property *as a trustee.* In this case the complainants rely upon no irregularity of proceeding, upon no absence of form. The forms of law were scrupulously observed. But they rely upon *faithlessness to trusts* and common obligations, upon combinations against the policy of the law and fraudulent, and upon confederate and successful efforts to deprive them wrongfully of property in which they had a large interest, for the benefit of persons in whom they had a right to place confidence. Homologation is no obstacle to such a claim.

In *Farmers Loan and Trust Co.* vs. *N. Y. and N. Railway Company, et al.,* 44 N. E. 1043, 150 N. Y. 410, the Court held that where a railroad corporation purchases a majority of the stock of another corporation for the purpose of controlling its property, equity will not lend its aid to such stockholder by enforcing a mortgage and decreeing a fore-

closure against the property of the corporation at the request of such stockholder, and to the manifest injury of the minority stockholders, and the destruction of their interests in the corporation.

This plaintiff is the same Trust Company as was plaintiff in the Northern Pacific so-called foreclosure.

The Court said at page 1047:

"In *Gamble* vs. *Water Co.,* 123 N. Y. 91, 25 N. E. 201, in discussing a similar question, Judge Peckham, in effect, said that, although it is not every question of mere administration or of policy upon which there might be a difference of opinion that would justify a minority in coming into a court of equity to obtain relief, yet, when the action of a majority of the stockholders of a corporation is fraudulent or oppressive to the minority shareholders an action may be maintained by the latter, where the contemplated action of the majority is so far opposed to the interests of the corporation as to lead to a clear inference that such action is to serve some outside purpose, regardless of the consequences to the company and inconsistent with its interests.

In *Ponder* vs. *Railroad Company,* 72 Hun. 385, 389, 25 N. Y. Supp. 560, where the Erie Railroad Company, through the action of the Buffalo, Bradford and Pittsburgh Railroad Company, whose directors were elected and controlled by the Erie Company, without consideration, obtained the property of the latter corporation and so arranged its affairs as to render all the shares of its stock other than those held by the Erie Company valueless, it was held that a stockholder of the Buffalo, Bradford and Pittsburgh Railroad Company might maintain an action to redress the wrong done to his company. In that case Mr. Justice Follett said: 'This was a fraud on the Buffalo, Bradford and Pittsburgh Railroad Company and its shareholders. Such frauds are not uncommon in the management of corporations, and, when they are exposed, should be condemned by the Courts, and a heavy hand laid upon all who participate in them.'

In *Barr* vs. *Railroad Company,* 96 N. Y. 444, where the officers of another corporation had leased the property of the first corporation, controlled a majority of its stock and *conspired to compel* the *minority to sell its stock by refusing to pay the rent due,* it was held that a court of equity on the application of the minority, would compel the payment of the rent; and that where the majority of the stockholders of a corporation are illegally pursuing a course which is in violation of the rights of other stockholders, an action to obtain equitable relief may be maintained by an aggrieved stockholder.

Sage vs. *Culver,* 147 N. Y. 241, 41 N. E. 513, is to the effect that, when it can be fairly gathered that the officers and directors of a corporation have made use of relations of trust and confidence to secure or promote some selfish interest, it is enough to set a court of equity in motion, and to require them to explain such a transaction which there is presumption against in equity.

In *Meyer* vs. *Railway Company,* 7 N. Y. St. Rep. 245, it was held, that a *majority of the stockholders* of a corporation would *not be permitted* to *sanction* a *transaction* which is the *outcome* of a *scheme dishonest* or *fraudulent* in its *inception,* and that the *minority stockholders* have *rights* which under such circumstances *must be recognized;* but the majority may legally control the company's business, but in assuming such control they take upon themselves the correllative duty of diligence and good faith; and they cannot manipulate the company's business in their own interests to the injury of the minority stockholders.

In *Ervin* vs. *Navigation Co.,* 27 Fed. 630, it was held that when a number of stockholders combine to constitute themselves a majority to control the corporation as they see fit, they become for all practical purposes the corporation itself, and *assume the trust relation* of the corporation toward its stockholders; and if they seek to make profit out of it, at the expense of those whose rights are the same as their own, they are unfaithful to the relation they have assumed, and guilty, at least, of constructive fraud, which a court of equity will remedy."

POINT 20.

The mortgage and bonds executed and issued on July 1, 1870, by the railroad company under the Joint Resolution were never foreclosed or released and are still in force and effect and held as security for the preferred stock of the appellants and others. All the mortgages and bonds subsequent to July 1, 1870, purported to have been executed and issued by the railroad company are in violation of the Act of July 2, 1864, and were and are absolutely null and void and the trustees and holders took the same with knowledge that they were so unauthorized, null and void and not binding obligations of the railroad company, nor liens on any of its properties and lands.

POINT 21.

The preferred stock of the railroad company owned by appellants is a debt, secured by equitable lien on lands and otherwise as well as a stock and as to it the 1896 so-called reorganization and foreclosure are void under the principles of the Boyd case and others.

POINT 22.

The so-called foreclosure proceedings of 1875 were in no wise a foreclosure of the mortgage of July 1, 1870. The same was not foreclosed, no title ever passed to the properties of the railroad company and the so-called foreclosure proceedings were merely an exchange of securities. While the officials of the railroad company and the railway company for practically fifty years persistently pleaded in Court and contended before Congress that there was a valid foreclosure and passing of title in 1875 and issued numerous mortgages relying on the validity of said so-called foreclosure yet in 1924 and 1925 they abandoned such contentions and admitted there was merely an exchange of securities and not a foreclosure or passing of title; Congress was not satisfied with this admission by the railway company but required a finding of fact and determination thereof by the Courts.

Points 20, 21 and 22 will be considered with assignment of error IV (appendix, p. 72).

The purchasers and Mortgagees in 1896 at the so-called foreclosure and exchange of stock took possession with notice that there was no foreclosure in 1875 and that the

1870 mortgage was still an effective lien on the property. *Simmons Coal Co.* vs. *Doran,* 142 U. S. 417; 35 L. Ed. 1063, quoted under Point 13 above.

The 7.3% bonds under the mortgage of July 1, 1873 are still alive and there has been no foreclosure, payment, satisfaction, or release of same, and they are still security for the preferred stock (R., 986). It seems that the bonds were taken up with the preferred stock and deposited with the trust company in New York and are further security for the preferred stock. The railway company carried the bonds in its balance sheet of September 28, 1876, and its report of June 30, 1898, as assets (R., 1100).

There was a provision that the preferred stock was to be paid off by the sale of certain lands (R., 987), and a great deal of the preferred stock was paid in that manner and from the history of the preferred stock as set out in the statement of the case and in the papers referred to it seems evident that the preferred stock was an equitable lien on the said lands as well as on the 7.3% bonds; the bonds were taken up in exchange for the preferred stock and as long as there were no foreclosure or release the preferred stockholders can claim an equitable line on same.

Preferred stock is an evidence of debt with a voting right when so authorized between the preferred and common stockholders and such authorization is permissable just like bonds at certain times obtain voting rights.

Preferred stock has been recognized as certificate of indebtedness in some cases. *Williams* vs. *Parker,* 136 Mass. 204; *Burt* vs. *Rattle,* 31 Ohio St. 116.

The attempt in the so-called Plan of 1896 to cut out or assess the preferred stock voids the Plan and also the so-called foreclosure of 1896 under the Boyd case which is now *res judicata* as to the Railway Company.

Provisions in the preferred stock and mortgage that the preferred stock be redeemed by sales of land is conclusive proof it is a debt.

POINT 23.

The Demurrer to paragraph 18 of the Amended Bill was properly sustained, but it should have been sustained to the entire Amended Bill because of the allegation of said paragraph 18, and other allegations in the Amended Bill; likewise appellant's motion to dismiss Amended Bill should have been granted.

This Point will be considered with assignment of error XIX (appendix, p. 78).

A demurrer opens the entire record and he who first files an insufficient pleading will be cast.

The Amended Bill, paragraph 18 (R., 51), alleges that the properties of the Railroad Co. "passed into possession and control" of the Railway Co., which "did exercise complete ownership" of same.

There are no allegations denying or raising the question of the validity of the mortgages, foreclosure or plan, or other contentions before the Joint Congressional Committee, although it is alleged that the stock, bonds, obligations, and properties taken over were those of the N. P. R. R. Co., as reorganized under the Plan of 1875, and not of the Federal Corporation. On the facts alleged the court properly sustained the Demurrer to Paragraph 18 as no question of validity of the mortgages or foreclosures was or could possibly be involved.

The Court then (10/3/35 and 1/29/36) should have dismissed the Amended Bill unless the Government amended by putting in the issues required by the Mandate of the Act of 1929.

POINT 24.

A corporation seeking to reorganize cannot make stockholders sell or take other stocks—Therefore, if this is a valid reorganization appellants are entitled to $203 per share as of July 13, 1896, with interest to date.

POINT 25.

If the so-called Reorganization and foreclosure of 1896 are held valid by the Court, then and in that event appellants are

entitled as relief in the alternative to have all the properties, railroad, lands and assets of the Railway Company charged with a prior lien in favor of the appellants and all non-assenting stockholders in the sum of $203 for each share of railroad company stock held by them with interest at 6 per cent per annum on such amounts from July 13, 1896, until paid.

All of the Northern Pacific Railroad Company's debts and obligations and all of its stock (R., 1058) except the non-assenting stockholders, and all of the reorganization expenses were paid (R., 1059) and satisfied without the Syndicate Members having to put up a cent or having to make good or pay a cent on their guaranty and without any cost to the railway company (R., 1059): sufficient stock of the railway company issued by it as part of its agreed purchase price, which could more than pay the non-assenting stockholders, including these petitioners and those associated with them, the $3,255,900 par value of their railroad stock and also their proportion of all dividends declared on railway company stock since 1896, was returned to the railway company in 1897 in addition to the other stocks, bonds and securities, also part of said purchase price, that were similarly returned to the railway company as listed and set out in Paragraphs 8 and 14 of the Intervening petition (R., 1170 to 1107).

The railway company, its officers and officials are holding all of the preferred and common stock of the railroad company now in its possession, ownership or control as trustees for the holders and owners of the securities and stocks of the railway company issued since July 1, 1896, whether issued as a corporation, a *de facto* corporation, a partnership or other association and the said railway company, its officers and officials should be enjoined and restrained from in any manner selling, disposing of or transferring said preferred and common stock of the railroad company or any part thereof or a trustee should be appointed to take possession and control of same for the security and protection, of the holders of any and all securities and stocks issued by the said railway company since

July 1, 1896, and of the public in order that there may be no break in the market of said securities and stocks of said railway company.

The sworn statement of the railway company to the State of Montana, July 13, 1896 (R., 1060), that *only $4,300 was "actually"* paid in in cash on railway company stock contradicts and overcomes any claim that the so-called *deposits of $10.00* and $15.00 on railroad stock was in payment for railway company stock, or for working capital or for rehabilitation; the so-called deposits collected and pocketed by the Syndicate amounted to approximately $12,000,000.

Any contention that the deposits were on the railway company stock is contrary to the Wisconsin statute, Section 1751, in force in 1896, which provided as follows: "No corporation shall issue any stock or certificate of stock except in consideration of money, or labor or property estimated at its true money value, actually received by it equal to the par value thereof," etc.

The invalid *so-called reorganization* of 1896 was not, as customarily is done, left to a *Committee,* but *J. P. Morgan & Company were made Reorganization Managers,* and all of the assenting stock of the railroad company was sold to them so they could and did exercise the *right of ownership* and voting, and they also owned and voted during the same period the stock of the railway company.

All of the deposits made by assenting stockholders of $10 and $15 went to the Syndicate for further profits and expenses, and none of it went to the Railroad Co. or Railway Co., for working on rehabilitation capital as was required by the so-called Plan; this is admitted by documents, papers and testimony and statements of various officials.

In *C., R. I. & P. R. R. Co.* vs. *Howard,* 19 L. Ed. 117 at 119, Court said:

Those proposing to sell agreed that they would, with all possible dispatch, cause the mortgages on the railroad to be foreclosed, and that the entire property of the Company, real and personal, should be sold and conveyed to trustees, and that the same should be transferred to such incorporated company in that State as to the other contracting party should designate as the purchaser of the prop-

erty, if such designation was made within the time therein prescribed.

By the terms of the *agreement* the Chicago and Rock Island Railroad Company agreed to cause to be incorporated in that State a company which should make the purchase, as proposed, for the sum of $5,500,000, and complete the railroad to the place therein mentioned, and the other party stipulated that the purchaser at the foreclosure sale should convey the railroad to the new Company for that consideration. Pursuant to that agreement the mortgages were foreclosed, and the new Company, to-wit: the Chicago, Rock Island and Pacific Railroad Company, was created under the general laws of the State, and the entire property of the railroad was sold at the foreclosure sale, and the purchasers conveyed the same to the new Company as stipulated in the agreement. *All the stockholders in the old Company became thereby entitled,* as against all those who joined with them in negotiating the sale, to a *pro rata share* in the sixteen per cent of the consideration reserved to their use under the scale of *distribution described in* that *arrangement.*

* * * * * *

Conceded fact is, that the property and franchises of the railroad were sold for the consideration specified in the record, and that the mortgage bondholders discharged their lien for eighty-four per cent of that amount, and that the residue of the purchase money remained in the hands of the purchaser discharged of the lien created by the mortgages, and the complainants contend that it was clear of all liens, except that of the creditors. Such a corporation cannot be said to own anything separate from the stockholders, unless it be the tangible property of the company and the franchises conferred by the charter; and it is *conceded by both* parties *that* the *fund in question was derived from a voluntary sale and transfer* of *those identical interests.* They were heavily incumbered by mortgages, and our attention is called to the fact that the provisional arrangement was negotiated by the stockholders and bondholders; but the *decisive answer* to that suggestion is, that the *two Railroad Companies* were *parties* to the subsequent *contract* of sale, and that they both agreed to all the terms of sale and purchase, and to the mode of transferring and of perfecting the title. Prompt payment was secured by the bondholders, and it is highly probable that they received

under that arrangement a larger portion of their claims than they could have obtained in any other way.

In Cook on Corporations (6th Ed.) it is stated:

Sec. 671. "In addition to the objections to a sale of all the corporate property to another corporation, referred to in the preceding section, there often is involved the question of whether the sale may be in exchange for the bonds and stock of the vendee company. In these days of consolidations, reorganizations and mergers of corporations it frequently happens that the purchase price is paid in the stock and bonds of the purchasing company. The question then arises whether the selling company has power to take stock and bonds in payment, and *whether it may compel its stockholders to accept such* stock and bonds upon a distribution of the assets of such selling company. The *general rule* has been that the *stock* of the *vendee* company *received* by the *vendor* company in *payment* for the *property cannot be forced upon dissenting stockholders* of the *vendor* company in a distribution of its assets. *They are entitled to money.* Such of them as do not wish to accept the stock of the new corporation are entitled to the value of their stock in the old corporation in cash, and may have an injunction until they are secured.[2] It has been held that a stockholder may enjoin a sale of all the corporate property to another corporation in exchange for the stock and mortgage bonds of the latter, even though the corporation offers to pay in cash the full value of his stock, and that not even a statute can deprive a stockholder of this right, except possibly under the reserved right to amend the charter. To compel the stockholder to take such stock would be *compelling him to sell his stock.*[1] Moreover, to *compel the stockholders* of the *old corporation* to *accept* the *stock* of the new corporation in payment for their interest in the old *would* be, *in effect,* to *compel* them to *join* the *new corporation,* or, what is the same thing, compel them to *consent to* a *consolidation.*[2] The Supreme Court of the United States has decided that the majority stockholders have no right, upon dissolution, to sell the corporate property to a new corporation for stock in the latter, and then say to the minority, 'We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the

Note 2. *Barnett* vs. *Phila., &c., Co.,* 67 Atl. 912 (Pa.).
Note 1. *Morris* vs. *Elyton, &c., Co.,* 125 Ala. 263.

shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one'.[3] At the public sale the majority stockholders may buy in the property; but they have no right to buy it at private sale at a price which they themselves put upon it. Where, however, the price is a fair one, and all stockholders are allowed to participate, it is not likely that a court would order a public sale, there being no tangible prospect of benefit from such a public sale. As to a sale of the corporate property for purchase-money bonds in payment, this is equivalent to a sale for money payable in the future, and hence the transaction is not open to the same objections as in the case of stock. Actual fraud, however, will, of course, always invalidate such a sale.''

In *S. P.* vs. *Bogert,* 250 U. S. 463, 63 L. Ed. 1099, the Court said:

''Fifth. Equally unfounded is the contention that the Southern Pacific cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has *not shared* with the *minority.* The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders.''

''Seventh. The Southern Pacific also contends that the decree is erroneous because the effect is to give the minority their *pro rata* share in the new Houston Company without their having made any contribution towards satisfying the floating indebtedness of the old; whereas, the floating-debt creditors had a claim against the property prior in interest to that of the old company's stockholders. *Kansas City Southern R. Co.* vs. *Guardian Trust Co.,* 240 U. S. 166, 60 L. Ed. 579, 36 Sup. Ct. Rep. 334; *Northern P. R. Co.* vs. *Boyd,* 228 U. S. 482, 57 L. Ed. 931, 33 Sup. Ct. Rep. 554. The fact that no provision was made for the floating indebtedness is not a bar to the minority obtaining relief. They did not come into court with unclean hands because there were floating-debt creditors unpaid. If any floating-

Note 3. *Mason* vs. *Pewabic Min. Co.,* 133 U. S. 50.

debt creditors have been illegally deprived of rights, it was not by the minority's acts."

"Eleventh. The *certiorari* and return were filed May 3, 1918. On October 8, 1918, separate petitions were filed in this court by Henry J. Chase, by Fergus Reid, by Albert M. Polack, by Francis P. O'Reilly, and by the Corn Exchange Bank, alleging that they were, respectively, owners of stock in the old Houston Company and praying leave to intervene, and that they be permitted to share in the benefits of the decree, or in the alternative, that they be permitted to make such application to the district court. Action on these petitions was postponed to the hearing of the case on the merits. As the case must be remanded to the district court for further proceedings, as above stated, we deny these several petitions without expressing any opinion on their merits and without prejudice to the right to apply to the district court for leave to intervene and share in the benefits of the decree."

The District Court in the same case (226 F. 500 at 512), which was affirmed, found and determined as follows: "It must be held that the defendant has, for the purpose of the present action, obtained the property free from any lien or claims of the general creditors. The plaintiffs did not have an opportunity to prevent the action of the majority stockholders, in thus acquiring the property of the railway company, and the Southern Pacific Company acquired this property subject to any equitable rights which the minority stockholders might have therein. Such cases as *Ervin* vs. *Oregon Ry. & Navigation Co.* (C. C.), 27 Fed. 625; *Farmers' Loan & Trust Co.* vs. *N. Y. & N. R. Co.,* 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep 689; *Sparrow* vs. *Bement,* 142 Mich. 441, 105 N. W. 881, 10 L. R. A. (N. S.) 725; *Backus* vs. *Brooks,* 195 Fed. 452, 115 C. C. A. 354; Cook on Corp., Sec. 662, and cases cited; *Synnott* vs. *Cummings* (C. C.), 116 Fed. 40—sufficiently establish the proposition that the minority stockholders had rights which they could enforce against the property in the hands of the majority stockholders. In enforcing these rights, they can insist upon an accounting and division of their property in equity, leaving the property, that is, the shares of stock in their hands, subject to any claims which are still valid and enforceable against the stockholders, either through the Houston & Texas Central Railway Company itself, or against the stockholders directly." (See quotation under Point 3.)

See full quotation from *Thompson* vs. *Deal,* 67 App. D. C. 327; 92 F. (2d) 478. (Appendix, p. 88.)

In *Moore* vs. *Los Lugos Gold Mines,* 172 Wash. 570, 21 Pac. (2d) 253, the Court held and said at page 588: "Nor may a corporation be dissolved or reorganized other than in the manner prescribed by the statute.

'A corporation has no inherent power to incorporate or reorganize. Generally, a reorganization can be effected only by virtue of statutory authority. * * * The right to reincorporate or to reorganize is like the right to incorporate in the first instance, and can only be exercised by virtue of legislative authority.' Thompson on Corporations (3d Ed.), Sec. 5966.

'But where there has been no judicial sale of the property, a reorganization can be accomplished by the stockholders *only upon the consent* and *agreement of all,* unless there is some statutory provision or an agreement by which the stockholders either not consenting or not consulted shall be protected.' Thompson on Corporations (3d Ed.), Sec. 5988."

* * * * * *

"A pertinent authority is *Whicher* vs. *Delaware Mines Corporation,* 15 P. (2d) (Ida.) 610. In that case, the reorganization was attempted by a majority of the stockholders instead of by mere action of the board of trustees, as in the case at bar. Citing with approval *Theis* vs. *Spokane Falls Gas Light Co.,* 34 Wash. 23, 74 Pac. 1004, the court said:' " * * * 'There can be no question as to the right of stockholders to reorganize their corporation, but this right is subject to this well-defined rule that a part of the stockholders, *even a majority, cannot reorganize* and deprive nonconsenting stockholders of their property or change their contract rights, *without their consent.* A *stockholder has a vested interest in the corporate property* and *earnings,* represented by his shares of stock, of which he cannot be deprived, in the absence of a delinquency which justifies and authorizes forfeiture * * * .'

"In other words, nonassenting stockholders 'may not lawfully be compelled to accept a change of investment made for them by others, or to elect between losing their interests or entering a new company'. *Geddes* vs. *Anaconda Copper Mining Company,* 254 U. S. 590, 41 S. Ct. 209, 212, 65 L. Ed. 425. Other cases to the same effect are."

In *United States* vs. *N. O. P. Ry. Co.,* 248 U. S. 507, 63 L. Ed. 388, the Court found and determined: "The suits were brought by the United States, the defendants being the patentee and the present holders of the title under the patents. The relief prayed was that the patents be canceled, or, if that be not done, that the homestead *claimants be decree to be the equitable owners, and that a trust in their favor be declared and enforced. Of these alternative prayrs, the latter was better suited to the case stated.*"

* * * * * *

"The existence and extent of these claims were well known among the people of the neighborhood, and the improvements and evidences of inhabitancy and cultivation on each tract were such that anyone purchasing under the land grant would be charged with notice of the nature and extent of the settler's claim."

* * * * * *

"As the patents were issued before and the suits were brought more than five years after the *act* * * * , the prayer that the patents be cancelled must be put out of view and the alternative prayer that the title under the patent be declared to be held in *trust* for the homestead claimants and the trust enforced must be regarded as if standing alone."

And the trust was established and enforced.

See last paragraph in *Jackson* vs. *Ludeling,* 88 U. S. 616, 22 L. Ed. at 495, quoted herein, p. 127.

In *United States* vs. *Dunn,* 268 U. S. 121, 69 L. Ed. 876, the Court held: "Where a guardian fraudulently leases his ward's property, the ward may, at his option, follow the property until it reaches the hands of an innocent holder for value, or claim the proceeds of the lease in the hands of him who fraudulently acquired it from the guardian.

One securing, through corrupt action of a guardian, property of the ward, *becomes a trustee exmaleficio,* and equitably bound to hold for the benefit of the ward, or, in case he disposes of the property, bound to hold the proceeds under like obligation.

One who, with full knowledge of the facts, purchases from a guardian stock which he receives as consideration for making a lease of his ward's property, takes subject to a trust in favor of the ward."

The Court said at page 882: "The legal principles governing the right to follow trust funds diverted in breach of the trust were succinctly and accurately stated by Tur-

ner, L. J., in *Pennell* vs. *Deffell,* 4 De G. M. & G. 372, 388, 43 Eng. Reprint 551, as follows: 'It is * * * an undoubted principle of this court that, as between *cestui que* trust and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.'

To the same effect are *Oliver* vs. *Piatt,* 3 How. 333, 401 11 L. Ed. 622, 652; *Lane* vs. *Dighton,* 1 Ambl. 409, 27 Eng. Reprint 274; *Ex parte Dumas,* 1 Atk. 232, 233, 26 Eng. Reprint 149, 2 Ves. Sr. 582, 28 Eng. Reprint 373; *Taylor* vs. *Plumer,* 3 Maule & S. 562, 571, 105 Eng. Reprint 721, 2 Rose 457, 16 Revised Rep. 361; (133) *Cobb* vs. *Knight,* 74 Me. 253; *People* vs. *California Safe Deposit & T. Co.,* 175 Cal. 756, L. R. A. 1918A, 1151, 167 Pac. 388; *Hubbard* v. *Burrell,* 41 Wis. 365.

The rule is the same as against a fraudulent vendee who has exchanged the property purchased for other property. *American Sugar Ref. Co.* vs. *Fancher,* 145 N. Y. 552, 27 L. R. A. 757, 40 N. E. 206.

The rule is the same with respect to the proceeds of property tortiously misappropriated and found in the hands of the tort-feasor or his transferee with notice. *Newton* vs. *Porter,* 69 N. Y. 133, 25 Am. Rep. 152."

To the same effect is *Ervin* vs. *Navigation Co.,* 27 Fed. 630 (C. C. S. D. N. Y.), cited above pp. 59 and 131, that the majority are trustees for the minority.

See *First National Bank* vs. *Flersheim,* 290 W. S. 509, 78 L. Ed. 475, quoted under Assignment of Error I, above.

In Thompson on Deal, 67 Appl. D. C. 327, 92 F. (2d) 478, held that suit to impress a trust and to compel restoration is properly brought as a class suit (see quotation in Appendix, p. 88).

ASSIGNMENT OF ERROR III.

This assignment of error (Appendix p. 71) is addressed to the error of the Court in denying the first exception of the defendants to the master's first report (R., 662), thereby denying the general motion to dismiss the amended bill.

The Commissioner's holding was if the motion was granted there could be no accounting, but in this he was wrong. The reasons justifying the motion to dismiss are set out in the Motion (R., 244, *et seq.*), and heretofore in this brief under different Points.

Further discussion of this and the following assignments of error are necessarily limited because of the restriction on the length of this brief by the rules and Court.

ASSIGNMENT OF ERROR V.

This assignment of error (R., 1219) is addressed to the error of the Court in denying the second exception of the defendants (R., 663) to the master's first report, thereby striking out the plea of laches. (Assignment is in Appendix, p. 72.)

The Government whenever it contracts with private parties thereby lays aside its sovereignty and is treated by the Courts as citizens are treated; this is the well established rule in the Court of Claims and Supreme Court.

ASSIGNMENT OF ERROR VI.

This assignment of error (R., 1219) is in Appendix (p. 72) and contests the Court's ruling in denying the plea of defendants' of *res judicata,* and thereby overruling their third exception to said first report of the master (R., 663).

The same argument is applicable here as that addressed to the second exception above.

ASSIGNMENT OF ERROR VII.

This assigns as error the denial of defendants' fourth exception to first report of master overruling the demurrer to the XXII paragraph of the amended bill (R., 663; Appendix, p. 72).

This paragraph relates to what is known as the Portage, Winnebago & Superior R. R. grant of May 5, 1864 (13 Stats. 66).

This paragraph is not sufficient under the Ruling of

Secretary Smith some thirty odd years ago in 21 L. D. 412; such a ruling by an administrative branch of the government, unchanged or unchallenged by Congress or the courts will not after so long a time be overruled by the Courts.

ASSIGNMENT OF ERROR VIII.

This assignment (R., 1220; Appendix, p. 73), assails the decrees of March 9 and 22, 1938 (R., 1187, 1209), denying,—not striking out—appellant's motion to construe, modify or amend second report of master (1182), as he assumed, without any pleadings or evidence that the title and ownership of the railroad properties had passed to the railway company, and because he had confused by various terms the meaning of the report.

Smith vs. *Seibel,* 258 Fed. 454 (D. C. Iowa), held that the legal conclusions from the facts found is a master's report, or which are not disputable, can be asserted and considered and determined by the Court, although no exception was filed; but here appellants and railroad Co. by Minority stockholders filed exceptions (R., 1185).

Some few times in the report the master spoke as if the property belonged to the railroad company; the report not only is erroneous and too indefinite but it is unfair.

The Court will note that the lower Court heard and determined this motion on its merits, and did not strike it, consequently recognizing the Movants as parties to the cause.

ASSIGNMENT OF ERROR XII.

This assignment (Appendix p. 74) is to the error in striking out motions of appellants and railroad company by minority stockholders to re-refer the second report of the master for a full and complete taking of testimony on important matters. The railroad company is more vitally interested in a complete hearing and report than any other party to this litigation.

ASSIGNMENTS OF ERROR XIV AND XV.

These assignments (Appendix pp. 75, 76) relate to procedural errors in that in several instances the Court struck out pleadings or motions to which no objections had been made, or motions to strike filed.

On August 25, 1937 (R., 951), minority stockholders on behalf of the railroad company filed a motion to extend the time within which the railroad company might file exceptions to the second report of the master. No objections to, or motions to, strike this motion were filed or made, and although the exceptions were filed February 19, 1938 (R., 1185), and should have been received as matter of course under the practice, and considered, yet the Court by decree of March 9, 1938 (R., 1187), struck out the motion to extend time, and then by said decree struck out the exceptions of the railroad company by minority stockholders, and of the appellants, notwithstanding no objection had been made to, or motion filed to, strike the exceptions; the court seemingly took charge of the case for the Government and the railway company.

ASSIGNMENT OF ERROR XXIV.

This assignment (R., 1231, Appendix, p. 81) alleges error by holding that after a fund is established in this cause that appellants and others could come back into the cause and assert ownership, but in doing so the court used words that would become *res judicata* against appellants and other minority stockholders and against the railroad company—this was the decree of March 9, 1938,—but in the decree of March 22, 1938, this was rectified by a modification so as to remove the *res judicata*. But the modified decree erroneously keeps and prevents the railroad company by minority stockholders and the appellants from participating in the trial and hearings of this cause, which is very prejudicial to the railway company, and beneficial to the railway company and the Government who are cooperating together to hinder appellants and minority stockholders and to prevent the rights of the railroad com-

pany from being fairly and fully heard and determined, and findings made, by the Court for Congress.

None of them seem to have any regard for the mandate of Congress.

ASSIGNMENT OF ERROR XXV.

"The court erred in sustaining the plaintiff's Exception No. 12, involving Absaroka and Beartooth forest."

ASSIGNMENT OF ERROR XXVI.

"The court erred in sustaining plaintiff's Exceptions No. 16 to 27, inclusive, and Nos. 38 and 39, involving substitution of base."

ASSIGNMENT OF ERROR XXVII.

"The court erred in sustaining the plaintiff's Exception No. 40, 43, (a), (b), and (e), 44, 48, and 49, involving the availability of withdrawing lands for indemnity selection, and Nos. 55 and 56, involving Fort Ellis Military Reservation."

A careful study of the report of the Commissioner on each of the subject matters of the preceding three assignments of error will quickly demonstrate the fallacy of the Court's decision in sustaining the exceptions of the United States (R., 893 to 949).

ASSIGNMENT OF ERROR XXXII.

"The court erred in the Orders of March 9th, 1938, and of March 22, 1938, in striking out the Answer and Cross-Bill, in not permitting the filing of the Intervention Petition, and in not requiring the Northern Pacific Railway Company and plaintiff to answer same, and in not requiring the Northern Pacific Railway Company to answer the Interrogatories and produce the papers and documents called for in Interrogatories, as this Appellant is entitled, and it is necessary for Appellant in preparation for the hearing on the ownership of the funds and property to be established to have said data and documents."

As the Court by the decrees thus holds the appellants and the railroad company by minority stockholders in the court for future hearings, and as it also denied motions of

theirs on their merits instead of striking out, the Court cannot by this method relieve the railway company from answering the interrogatories and cross-bill, and the Government from answering the cross-bill.

Such action and procedure by the Court is in direct violation of Equity Rule 58; Civil Procedure Rule 33.

ASSIGNMENTS OF ERROR XXVIII, XXIX, XXX AND XXXI.

Lack of space necessitates leaving any discussion of these four assignments until the oral argument or reply brief.

These assignments contend that the Court erred in denying the four exceptions of the railroad company to the master's second report (R., 703, 725-9, 846-65).

CONCLUSION.

While the Supreme Court under its discretionary power can limit the hearing to one matter in a decree, this Court has no such power; an appeal to a decree is mandatory if the decree is final, and this Court cannot divide a decree, but this Court on the other hand can determine all matters in the record that are necessary or proper for speeding and facilitating future proceedings in the cause and in terminating litigation as early as possible.

In Jurisdiction of the Supreme Court of the U. S. by Robertson and Kirgham, at page 558, it is stated: "A limitation in an order granting *certiorari* is binding upon counsel, and the Court will not hear argument on questions outside the scope of the order; but, while decision ordinarily does not exceed the limits of the order, the *Court has not regarded itself as thereby restrained from consideration of any question presented by* the *record which* it thereafter finds necessary or *proper to decide.*[88] In addition, facts developed at the argument may turn the case upon sub-

[87]See, for example, *Prudence Co.* vs. *Fidelity & Deposit Co. of Maryland,* 297 U. S. 198, 205, 56 S. Ct. 387, 80 L. Ed. 581.

[88]*Olmstead* vs. *United States,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376.

sidiary issues and render unnecessary or improper the decision of the question to which the re-examination was limited.[89]

It is also not uncommon for the Supreme Court to withhold its ruling upon a petition for *certiorari* until the happening of intervening events shall have assisted in a determination of the question whether the writ should issue."[90]

Wolfle vs. *United States,* 291 U. S. 7, 54 S. Ct. 279, 78 L. Ed. 617 (see the order granting *certiorari,* 290 U. S. 617, 54 S. Ct. 87, 78 L. Ed. 539).

An analogous situation is disclosed in cases like *Berger* vs. *United States,* 295 U. S. 78, 80, 81, 55 S. Ct. 629, 79 L. Ed. 1314, where the petition for *certiorari* is granted for the expressed reason that a conflict of decisions exists, but the Court, after deciding that point, *proceeds to the decision of another question* in the case, as to which there was no direct conflict, in order that the *case may be properly disposed* of in the *light* of the *situation revealed* by the *entire record.*

Mitchell vs. *Maurer,* 293 U. S. 237, 55 S. Ct. 162, 79 L. Ed. 338 (see the order granting *certiorari,* 293 U. S. 544, 55 S. Ct. 71, 79 L. Ed. 648).

Compare *Wolfle* vs. *United States,* cited in the preceding note, where the decision, in a supervening case, of the question to which the re-examination was limited, invited a consideration of other and related questions *in order to terminate the litigation.*

Appellants believe that it is clearly shown by the records and briefs that the pending application of the Northern Pacific Railroad Company by Schmidt and others, minority stockholders, should be granted and forthwith reversed.

Also that in this appeal the decree of March 9, 1938, should be reversed as well as both decrees of March 22, 1938, and the decrees of May 24, 1932, October 3, 1935, and

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[89]*McCandless* vs. *Furlaud,* 293 U. S. 67, 71, 55 S. Ct. 42, 79 L. Ed. 202,

[90]When action on a petition for *certiorari* is withheld, it is usually to await decision in a related case by the Supreme Court. Thus, in *United States* vs. *Anderson,* 284 U. S. 584, 52 S. Ct. 125, 76 L. Ed. 505, and *Burnet* vs. *Howes Bros. Hide Co.,* 284 U. S. 583, 52 S. Ct. 126, 76 L. Ed. 505, action was withheld pending decision in *Handy & Harman* vs. *Burnet,* 284 U. S. 136, 52 S. Ct. 51, 76 L. Ed. 207, after which petitions in both cases were granted and the decrees reversed *per curiam* on the authority of that decision. A similar procedure was followed in *United States* vs. *Corriveau,* 286 U. S. 530, 52 S. Ct. 578, 76 L. Ed. 1271."

the decree amending same January 29, 1936, and the cause remanded with instructions to permit the amendment of the cross-bill applied for at the bar of the lower court by making all the allegations and interrogatories of the intervening petition allegations and interrogatories of the said cross-bill and that the said cross-bill as amended with interrogatories and the intervening petition with interrogatories be filed and that the Government and Northern Pacific Railway Company and other defendants be required to answer the said cross-bill, intervening petition and interrogatories; that this Court decide and state in its opinion all the questions of law arising on the face of this record for the guidance of the lower court on the trial of the cause on its merits. That the said decrees be reversed with costs.

Respectfully submitted,

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Dated October 18, 1938.

APPENDIX


LAKE SUPERIOR
MINNESOTA POINT
WISCONSIN POINT
ENTRY
ALLOUEZ BAY
ST. LOUIS BAY
BAY OF SUPERIOR
WEST DULUTH
BELKNAP AVE.
CLOUGH ISLAND
SPIRIT LK.
SUPERIOR
SOUTH SUPERIOR
EAST SUPERIOR
ITASCA
POST OFFICE
ST. LOUIS
CENTRAL SUPERIOR
BOYLSTON
WALBRIDGE
T49
T48
MINNESOTA STATE LINE

(A)

PRIVATE LAWS OF WISCONSIN FOR 1872.

Chapter 139, page 340, March 25, 1872.

An Act to amend Chapter 455, private and local laws of 1865, and Chapter 233, private and local laws of 1870, and to prescribe further conditions upon which the Northern Pacific Railroad Company may construct and operate a railroad and telegraph line in this state.

Section 1. Any consent heretofore given by the legislature of this state to the N. P. R. R. Co. to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further condition that the said N. P. R. R. Co. shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji River and Connor's Point, a line of railroad, connecting with and continuous of the main line of said N. P. R. R., by a route running south of St. Louis River from the junction of said N. P. R. R. with the Lake Superior & Mississippi R. R., intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji Rivers, and running thence all the way in Wisconsin between said rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the Bay of Superior, between the said Nemadji River and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, and from said craft to said cars. And also, shall establish and forever maintain and some point between the said Nemadji River and Connor's Point, a sufficient depot for the accommodation of passengers. And until the said N. P. R. R. Co. shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin; *provided,* that the provisions of this section shall not apply to any road within the boundaries of Pierce or Saint Croix [county].

Section 2. A purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, shall, for the purpose of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad, for such distance as the road so purchased or consolidated with shall be constructed on said route.

Section 3. The said N. P. R. R. Co. is hereby forever prohibited from constructing, maintaining or operating any railroad or railroad bridge, or bridge of any kind, across the Bay of Superior between Minnesota Point and the shores opposite the same.

Section 4. The said N. P. R. R. Co. shall be governed by the provisions of the general railroad law of this state in respect to the width of the roadway and acquiring title to lands.

Section 5. The foregoing limitations upon the powers of the N. P. R. R. Co. are hereby declared to be conditions of any consent given by this state to said company to construct a railroad or telegraph line in this state.

Approved March 25, 1872.

GENERAL LAWS OF WISCONSIN FOR 1880.

Chapter 290, Page 347, March 15, 1880.

An Act to promote the development of the unsettled portions of Northern Wisconsin and to encourage the building of railroads therein.

Section 1. Any railroad company which shall first construct a railroad across northern Wisconsin, from Ashland or any point on Lake Superior, between townships forty-seven and fifty-one north, and east of range six west, on Lake Superior, to a junction with the Northern Pacific Railroad, and shall run cars over the same, within three years from the passage of this act, shall be relieved from the payment of any license fees on said road, between said Northern Pacific railroad and the point on Lake Superior above designated, for the period of 10 years from the date of its completion.

APPENDIX

17 U. S. Statutes at Large 477. (Feb. 27, 1873.)

Chap. CCVII—AN ACT TO AUTHORIZE THE NORTHERN PACIFIC RAILROAD COMPANY TO CONSTRUCT AND MAINTAIN A BRIDGE ACROSS THE ST. LOUIS RIVER.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company is hereby authorized to construct and maintain a draw-bridge across the Saint Louis river between Rice's point, in the State of Minnesota, and Connor's point, in the State of Wisconsin. That the said bridge shall be not less than ten feet above the level of the water of said river at the point where its construction is hereby authorized; that said bridge shall have a pivot-draw giving two clear openings of one hundred feet each, measured at right angles to the current at the average stage in the river, and located in a part of the bridge that can be safely and conveniently reached at that stage; and the next adjoining spans to the draw shall not be less than one hundred and fifty feet, if the proper location of the draw over the channel will admit spans of this width between it and the shore; and said span shall not be less than ten feet above extreme high-water mark, measuring to the bottom chord of the bridge; that said draw shall be opened promptly, upon reasonable signal, for the passage of boats whose construction shall not be such as to admit of their passage under the stationary spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw before or after the passage of trains.

*D*ec. 2. That the piers of the said bridge shall be built parallel with the current at that stage of the river which is most important for navigation; and that no ripraps or other outside protection for imperfect foundation will be permitted in the channel-way of the draw-openings.

Sec. 3. That the said Northern Pacific Railroad Company shall submit to the Secretary of War, for his examination, a design and drawings of the bridge and piers, and a map of the location, giving, for the space of at least one mile above and one mile below the proposed location, the topography of the banks of the river, the shore-lines at

high and low water, the direction of the current at all stages, and the soundings accurately showing the bed of the stream, the location of any other bridge or bridges, and shall furnish such other information as may be required for a full and satisfactory understanding of the subject by the Secretary of War; and if the Secretary of War is satisfied that the provisions of the law have been complied with in regard to location, the building of the piers may be at once commenced; but if it shall appear that the conditions prescribed by this act cannot with at the location where it is desired to construct the bridge, the Secretary of War shall, after considering any remonstrances filed against the building of said bridge, and furnishing copies of such remonstrance to the board of engineers provided for in this act, detail a board composed of three experienced officers of the corps of engineers, to examine the case, and, on their recommndation, authorize such modifications in the requirements of this act, as to location and piers, as will permit the consrtuction of the bridge, not, however, diminishing the width of the spans contemplated by this act: PROVIDED, That the free navigation of the river be not materially injured thereby.

Sec. 4. That all parties owning, occupying, or operating the said bridge shall maintain, at their own expense, from sunset to sunrise throughout the year, such lights on their bridges as may be required by the lighthouse board for the security of navigation; and all persons owning, occupying or operating the said bridge shall, in any event, maintain all lights on their bridge that may be necessary for the security of navigation.

Sec. 5. That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over the railroads or public highways leading to said bridge; and the United States shall have the right of way for postal-telegraph purposes across said bridge; and in case of any litigation arising from any obstruction or alleged obstruction to the navigation of said river, created by the construction of said bridge under this act, the cause or question arising may be tried before the district court of the United States of

any state in which any portion of said obstruction or bridge touches.

Sec. 6. That all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the Secretary of War, upon hearing the allegations and proofs of the parties in case they shall not agree.

Sec. 7. That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of the said bridge, is hereby expressly reserved, without any liability of the government for damages on account of the alteration or amendment of this act, or on account of the prevention or requiring the removal of any such obstructions; and if any change be made in the plan of construction of any bridge costructed under this act, during the progress of the work thereon or before the contemplation of said bridge, such change shall be subject to the approval of the Secretary of War; and any change in the construction, or any alteration of said bridge that may be directed at any time by Congress, shall be made at the cost and expense of the owners thereof.

Approved, Feb. 27, 1873.

Wisconsin Act of April 10, 1865, Chapter 485, authorizing N. P. R. R. Co. to build in Wisconsin.

Section 1. The consent of the state of Wisconsin is hereby given to the Northern Pacific Railroad Company, incorporated in an act of Congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route," approved July 2nd, 1864, to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances within its limits on the line in the said act of Congress indicated and authorized; and for the purposes aforesaid, and in said act of Congress set forth and in order to carry the same into full effect the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities within the limits of this state which are by said act of Congress conferred on them

within the territories and jurisdiction of the United States; provided that the said Northern Pacific Railroad Company shall be prohibited at any time prior to the actual building or equipment of said railroad from allowing any railroad company chartered by the laws of the state of Minnesota to use and enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company, to be exercised in the state of Wisconsin; and provided further, that nothing herein contained shall be construed to prevent the said Northern Pacific Railroad Company after the building and equipment of said road through the state of Wisconsin from making such contracts and connections with Minnesota railroads in the state of Wisconsin as they may deem proper.

Section 2. This act shall take effect and be in force from and after its passage and publication.

Amendment of Act of April 10, 1865, Chapter 485, by Act of March 10, 1870, Chapter 253:

Section 1. Chapter 485 of the private and local laws of 1865 is hereby amended by adding to the end of the first section thereof the following, to-wit: and provided further that it shall not be lawful for the said Northern Pacific Railroad Company to build the line of its road from Minnesota into Wisconsin nor from Wisconsin by crossing in any manner, whether by bridge, ferry or otherwise, the entry of the bay of Superior between Minnesota Point in the state of Minnesota and Wisconsin Point in the state of Wisconsin nor to construct or operate any railroad on or along the said Wisconsin Point for the purposes of a connection by that route with its own or any other railroad that may be constructed on or along said Minnesota Point. And the consent hereinbefore given is upon the express condition and understanding that at any time before the said Northern Pacific Railroad Company shall construct and operate to some point in Wisconsin on the west shore of the bay of Superior, a line of railroad continuous of and connecting with its main line in Minnesota by a route intersecting the western boundary of Wisconsin between the Nemadji and the St. Louis rivers and running all the way in the latter state between said rivers, it shall permit any other railroad which may be constructed from the west shore of the bay of Superior in Wisconsin to any point on the line of the said Northern Pacific railroad,

whether in Wisconsin or Minnesota, to make a connection with the said Northern Pacific Railroad on such terms and conditions as shall afford as good advantages and facilities in the respect of charges and dispatch, and in all other respects for the transportation of freight and passengers, between the eastern terminus aforesaid of the said other railroad and all points on the said Northern Pacific Railroad as shall be enjoyed for the transportation of freight and passengers between the Minnesota shore of the bay of Superior, or of St. Louis Bay or of Lake Superior, and all points on the said Northern Pacific Railroad, whether over the latter road or any other railroad with which it may have connections or both. And the Legislature may at any time hereafter pass such laws and authorize such proceedings as may be necessary to enforce the observance of any provision or condition of this act according to its spirit and intent.

Section 2. This act shall take effect and be in force from and after its passage.

Wisconsin Act of February 20, 1879, Chap. 44.

An act to enable Douglas County to compromise the litigation concerning its outstanding bonds and to use a portion of same to accomplish the purpose for which they were used.

Whereas the county of Douglas in 1872 issued to the Superior & St. Croix Railroad Company three hundred and fifty bonds of said county, of one thousand dollars each, to aid in the construction of a railroad in said county; and whereas, subsequently, seventy-five of the said bonds were delivered to the firm of Walbridge Bros. & Sargeant, contractors, to construct said railroad, and two hundred and seventy-five of said bonds were placed in the hands of the First National Bank of Madison, Wisconsin, as trustee to hold the same on certain conditions; and whereas a protracted litigation has been going on in the courts between said county of Douglas and said firm of Walbridge Bros. and Sargeant and other parties, defendants, in relation to the title and ownership of said bonds, which litigation is about to be mutually arranged and compromised upon such basis that the said two hundred and seventy-five of said bonds are to be returned to said county to be cancelled; but that such compromise depends upon

obtaining authority from the legislature to use fifty of said seventy-five bonds to be delivered to the said firm for the purpose of aiding in the construction of a railroad in said county hereafter; now, therefore,

The people of the state of Wisconsin represented in Senate and Assembly do enact as follows:

Section 1. Upon the depositing by the said firm of Walbridge Bros. and Sargeant with the present chairman of the board of supervisors of said county as trustee, within 40 days from the taking effect of this act, of said 50 bonds, with all the coupons attached thereto when they went into the hands of said firm, it shall be the duty of said board of supervisors as early as they may deem expedient and within the present year, to submit to the qualified voters of said county a proposition in substance as follows: that said fifty bonds shall be delivered by said trustee to such railroad company as shall, on or before a day to be named in said proposition, not less than two nor more than three years after the passage of this act have completed and made ready for use a railroad within the county of Douglas, from the bay of Superior to the Minnesota state line either on or near the company, equal in quality to the Northern Pacific Railroad in Carlton County, Minnesota, in exchange for a like amount of the stock of such company; such bonds not to be delivered until such road is completed and cars running thereon adequate for the demands of business on the road; all the coupons of said bonds falling due prior to such delivery to be cut off by said trustees and cancelled in the presence of the said board.

Section 2. It shall be the duty of the county clerk of said county upon the order and direction of the county board to cause to be published in a newspaper published in said county, if there be one, and to post up in at least three public places in said county, a notice that a special election will be held in said county at the usual place of holding elections upon a day to be mentioned in said notice, not less than fifteen days after the posting of said notices and publication, if there be one; at which election qualified electors shall vote upon the proposition mentioned in the preceding section, which proposition shall be substantially set forth in said notice. Votes cast in such election in favor of such proposition shall be by ballot with the words, "For using bonds for railroad". Votes against

such proposition shall be by ballot with the words "Against using bonds for railroad", written or printed thereon.

Section 3. Such election shall be conducted and the result thereof canvassed, certified, and published in like manner as is provided by law in the case of such election for the election of a county officer so far as such provision may be applicable.

Section 4. If a majority of the votes at such election shall be case in favor of such proposition, it shall be the duty of the trustee having custody of said fifty bonds to safely keep the same and to deliver them, less the coupons required to be cut off, to the railroad company which may be entitled thereto by compliance with the provisions of the first section of this act in exchange for a like amount of stock of such company.

Section 5. If a majority of the votes case at said election shall be against the proposition to use bonds for a railroad, then said trustee shall immediately cancel and destroy said fifty bonds and coupons of the same in the presence of the board of supervisors of said county; and if the majority of votes shall be in favor of said propsition and no company shall become entitled to said bonds by a compliance with the provisions of this act, then the said truste shall cancel and destroy the said bonds and coupons in a like manner.

Douglas County Resolution of January 18, 1882:

Whereupon said county board, at a meeting thereof duly held on the 18th day of January, 1882, passed and adopted the following resolution: "Whereas the county of Douglas by resolution of its board of supervisors passed on the 7th day of September, A. D. 1880 and duly entered in their record of proceeding, offered and agreed to transfer to the Northern Pacific Railroad Company, in aid of the construction of its road to Superior, certain property held by said county and in further aid of such road and to enable all persons interested in the county of Douglas to offer liberal contributions therefor, the said county further agreed to join in any conveyance to the aforesaid company made by such persons of whatever lands they might contribute in behalf of such road, so that their contributions should be without lien and free of all encumbrance, nevertheless upon the conditions that the Northern Pacific Railroad Company should within the year 1881, construct

and equip a railroad from the Northern Pacific Junction entering the state of Wisconsin and running therein between the St. Louis and Nemadji Rivers to the Bay of Superior at or near the mouth of said Nemadji river, and thence to Connor's Point along or near the westerly side of the Bay of Superior, with depot and convenient connection with docks or piers; and the said railroad company having, by resolution of its said board of directors and within the appointed time, duly accepted the offer and terms of agreement so as aforesaid made by and on the part of the said county, and the said Northern Pacific Railroad Company having, before the first day of January, A. D. 1882, constructed, completed and equipped its railroad upon the line aforesaid from the junction above named in Carlton County, Minnesota, to Connor's Point, in the town of Superior, Wisconsin, with a depot and connections in the manner and way as stipulated, and having performed on its part the conditions of such agreement and requested the execution and delivery of the deed or deeds therein provided:

Therefore, Resolved, That the county of Douglas release and convey to the Northern Pacific Railroad Company by quitclaim deed all lots, blocks, pieces and parcels of land and premises heretofore conveyed to Horace S. Walbridge, James Bardon and James B. Power, as trustees for said company, by Hiram S. Walbridge, James Stinson, Laurason Riggs, trustee, and James Stinson and Charles M. Counsel, trustees under the will of James Stinson, deceased, which conveyances are duly of record in this county and that the county clerk be, and he is hereby, directed to execute such release and conveyance in due form and to acknowledge and deliver the same to the said Northern Pacific Railroad Company. See Schedule "B" hereto attached.

Whereas the county of Douglas by resolution of its board of supervisors passed the 7th day of September, A. D. 1880, and duly recorded in their record of proceedings, offered and agreed to transfer by sufficient deed or deeds to the Northern Pacific Railroad Company all alienable lands or lots belonging to said county of Douglas which had been acquired by deed, to which said county had held undisputed title during two years then last passed, upon conditions that the said Northern Pacific Railroad Company should within the year 1881 construct, complete and

equip a railroad from the Northern Pacific Junction entering the state of Wisconsin and running therein between the St. Louis and Nemadji rivers to Connor's Point along or near the westerly side of said bay with depot ad convenient connection with docks and piers; and

Whereas the Northern Pacific Railroad Company by resolution of its board of directors and within the time specified duly accepted in writing the offer and terms of agreement so as aforesaid made by and on the part of Douglas County, and did before the first day of January, A. D. 1882, construct, complete and equip a railroad upon the line aforesaid from the Northern Pacific Junction so called in Carlton County, Minnesota, to Connor's Point in the town of Superior, Wisconsin, with a depot and connections in the way and manner stipulated as aforesaid and has performed on its part the conditions of such agreement and requested the execution of the deed or deeds therein provided:

Resolved, therefore, That the county of Douglas to pursuance to said agreement, release and convey to the Northern Pacific Railroad Company by quitclaim deed all the lots, blocks, pieces and parcels of land and premises described in Schedule "A" hereto attached and that the county clerk be, and he is hereby orderd to execute, acknowledge and deliver such deed to said company for the same."

Wisconsin Act of March 23, 1883, Chap. 150.

Section 1. Any conveyance heretofore made by the county of Douglas to the Northern Pacific Railroad Company under and in pursuance and satisfaction of resolutions of the county board of said county dated September 7th, 1880, and January 12th, 1882, is hereby declared to be valid and effectual to vest in the Northern Pacific Railroad Company the title to the lands conveyed or attempted to be conveyed by such conveyance; and any assignment of tax certificates heretofore made to the said railroad company upon the property or any thereof embraced in and conveyed by said conveyance pursuant to and in satisfaction of and compliance with said resolutions is hereby declared to be valid.

Section 2. This act shall be favorably construed to ren-

der effectual the said conveyance and assignment and shall take effect from and after its passage and publication.

PUBLIC SERVICE COMMISSION OF WISCONSIN
Fred S. Hunt, Chairman
Robert A. Nixon
R. Floyd Green
Calmer Browy, Director
Madison, Wisconsin
September 27, 1938.

Hudson, Creyke & Hudson
Mr. Raymond M. Hudson
404 Peoples Life Insurance Bldg.
1343 H Street N. W.
Washington, D. C.
Gentlemen:

We are enclosing a copy of a letter dated July 18, 1901, addressed to Joseph P. McCullen at Philadelphia by Graham L. Rice, Railroad Commissioner. This letter seems to be the one referred to in your letter of September 15, 1938, as it contains the information relating to the construction of the line northwest of the Nemadji River by the Superior and St. Croix Railroad Company. The infromation was furnished Mr. Rice by Sanborn, Luse, Powell and Ellis who were attorneys for the Northern Pacific Railway Company.

Very truly yours,
PUBLIC SERVICE COMMISSION OF WISCONSIN
FR:mr CALMER BROWY, Director.

COPY
Office of
Railroad Commissioner,
State of Wisconsin
Madison 7/18/1901

Mr. Joseph P. McCullen
1008-1009 Land Title Building
S. W. Cor. Broad & Chestnut Sts.
Philadelphia, Pa.
Dear Sir:—

Your favor of the 15th inst. relative to the Superior & St. Croix R. R. Co.; Northern Pacific Railroad Company, and Northern Pacific Railway Company, at hand.

I understand that the Superior & St. Croix Railroad

Company did construct a railway from Superior to the Minnesota State Line, Northwest of the Menadji river, and this road with the other property of the Company is still owned by it under the name of the Northern Pacific Railway Company. I understand further that the reorganization committee of the Northern Pacific Railroad Company acquired all the stock of the Superior & St. Croix Railroad Company, and then applied to the legislature and secured the pasage of Chapter 244 of the laws of 1895. By this act the name of the Superior & St. Croix Railroad Company was changed to the Northern Pacific Railway Company, and the latter being purchased by *mesne* conveyances all the property of the Northern Pacific Railroad Company through receiver's sale. The bridge and all the construction mentioned, made by the Northern Pacific Railroad Company, passed through the sales above mentioned. No proceeding other than the one reported in 93 Wis. 604 has ever been taken to test the constitutionality of the act of 1895.

Should you desire to bring proceedings to test the constitutionality of the law of 1895, the practice is, I believe, to make application to the Attorney General of the State to annul charter of the company.

I know nothing of the arrangement between the old Northern Pacific Railroad Company and the Superior and St. Croix Railroad Company in reference to the construction of the line.

The records show that July 1, 1896, the Superior & St. Croix Railroad Company changed its name to the Northern Pacific Railway Company, August 18, 1896, Alfred S. Carey, Special Master, sold the Northern Pacific Railroad Company to the Northern Pacific Railway Company.

Respectfully,

Railroad Commissioner.

Senate Resolution No. 247, 59th Congress, 2d Session. February 5, 1907.—Referred to the Committee on Pacific Railroads and ordered to be printed.

Mr. Heyburn submitted the following

RESOLUTION:

Whereas Congress by Act of July second, eighteen hundred and sixty-four, created a corporation under the name an title "Northern Pacific Railroad Company",

to construct and maintain a continuous railroad and telegraph line from Lake Superior to Puget Sound, and conferred upon said corporation a grant of more than forty millions of acres of public lands to aid in the construction of said railroad and telegraph line; and

Whereas whilst there have been two so-called "reorganizations" of the Northern Pacific property, one in the year eighteen hundred and seventy-five and the other in the year eighteen hundred and ninety-six, neither was ratified by Congress, and it is charged that neither reorganization took place under any valid judicial sale, but that in each instance the alleged reorganization was effected by a mere exchange of securities, the stock of the original Federal corporation always remaining as the basis of ownership, said stock, after eighteen hundred and sixty-seven, having been held in trust for a partnership association composed of J. Gregory Smith, of Vermont, and his associates, calling themselves "proprietors," the same being subsequently acquired from said so-called "proprietors" by an unincorporated joint stock association of bondholders formed in the year eighteen hundred and seventy-five as the reorganized "Northern Railroad Company," and on July thirteenth, eighteen hundred and ninety-six, a majority of the shares of stock and obligations of this latter organization of eighteen hundred and seventy-five having been delivered by J. P. Morgan and Company, reorganization managers, to the Wisconsin corporation, now known as the Northern Paific Railway Company, in exchange for the latter's stock and bonds under the terms of a written agreement wherein the Northern Pacific estate was valued at three hundred and forty-five millions of dollars, being one hundred and fifty-five millions of dollars in excess of all indebtedness whatsoever, real or alleged, existing against it, over two hundred and fifteen millions of dollars in excess of the mortgage bonds thereupon issued by said Wisconsin corporation, and over sixty millions of dollars in excess of the entire stock and bonds issued by said Wisconsin corporation in fulfillment of the so-called reorganization; and

Whereas it is charged that the said so-termed reorganization of *of* eighteen hundred and ninety-six was effected by a fraudulent conspiracy against the organization

of eighteen hundred and seventy-five and to the injury of the stockholders thereof, and that it results in a fraud upon the Government of the United States, by wrongfully making it appear that the ownership of the Northern Pacific Railroad, telegraph line, and land grant is no longer vested in a corporation of Congressional creation, over which Congress is possessed of direct and immediate legislative and visitorial power, and it appears that the said Wisconsin corporation in litigation against it instituted by the United States Government, hath undertaken to defend against the enforcement of the Act of Congress of August seventh, eighteen hundred and eighty-eight (Revised Statutes, section fifty-two hundred and sixty-nine), relative to the exercise of telegraphic franchises by railroad and telegraph companies subsidized by the United States, and hath averred therein that it is not subject to the provisions of the said Act of Congress because it never received any subsidy from the United States and because it "is not engaged in operating its said railroad or telegraph lines under any right or franchise derived from the Government of the United States or from any Act of Congress, but owns, operates, and maintains the said line of railroad and telegraph under and by virtue of the laws of the State of Wisconsin, under which it was incorporated and organized, and the laws of the several States in which the lines of railway and telegraph are situate;" and

Whereas these matters are proper subject for investigation by Congress: Therefore

Resolved, That a special committee, to be composed of five members of the Senate, be appointed to investigate fully and to make report as to all matters connected with the reorganization of the Northern Pacific Railroad property; in the course of said investigation to ascertain what title and estate in said railroad, telegraph line, and land grant is held or owned by the corporation created by Congress by Act of July second, eighteen hundred and sixty-four, and if said Federal corporation hath no title to or estate in any property, then to ascertain and report what reason, if any, exists why the said charter Act of July second, eighteen hundred and sixty-four, and its supplements should not be fully repealed by Congress.

Resolved, That said committee be empowered to enforce the attendance of witnesses and the production of all such records, books, papers, and documents as may be deemed necessary in the course of such investigation.

Senate Resolution No. 93, 60th Congress, 1st Session. February 6, 1908.—Referred to the Committee on Pacific Railroads and ordered to be printed.

Mr. Heyburn submitted the following

RESOLUTION:

Whereas the Northern Pacific Railway Company, a Wisconsin corporation, claims ownership of all the property and estate formerly of the Northern Pacific Railroad Company, a corporation created by Congress, and in certain litigation instituted by the United States Government in the United States circuit court for the district of Minnesota for the enforcement of the Act of Congress of August seventh, eighteen hundred and eighty-eight (Revised Statutes, section fifty-two hundred and sixty-nine), relative to the exercise of telegraphic franchises, the said Wisconsin corporation, opposing the enforcement of said statute and of the duties and obligations imposed by Congress as to the Northern Pacific railroad and telegraph line, asserted and averred that by reason of certain foreclosure proceedings and of the purchase of the Northern Pacific estate thereunder on and subsequent to July twenty-fifth, eighteen hundred and ninety-six, the said Wisconsin corporation, and the said property, are relieved from any of the obligations created by the various Acts of Congress which were set forth in the bill of complaint of the United Staes; and

Whereas said Wisconsin corporatoin has certified to the Interstate Commerce Commission that its capital stock of one hundred and fifty-five millions of dollars was issued "for the purchase of the Northern Pacific Railroad Company's property", and from the statement of said Wisconsin corporation, filed with the State of Montana (a certified copy of which is annexed to this resolution), it appears that all of said stock was issued on and prior to July thirteenth, eighteen hundred and ninety-six, before any of said judicial sales occurred, and that, with the exception of forty-three shares

thereof, all of said stock was issued in payment for the "stocks, bonds, and securities formerly of or belonging to the Northern Pacific Railroad Company, or of interests therein", which stocks, bonds, and securities it was recited in said statement "had a cash value exceeding forty millions of dollars"; and

Whereas it is a matter of public concern that it should be ascertained whether the ownership by the said Wisconsin corporation of the Northern Pacific Railroad, land grant, and telegraph line is acquired by virtue of valid foreclosure sales divesting the title of the Northern Pacific Railroad Company or whether the same is acquired by purchase of certain securities of the latter company, to the end that it may be determined whether the legal title to the property itself—the railroad, telegraph line, and lands—is vested in a State corporation or in a corporation of Congressional creation over which Congress is possessed of direct and immediate legislative and visitorial power; and

Whereas, to enable a vast and unwarranted increase to be made in the issuance and marketing of new stocks and bonds, it is alleged that the said Wisconsin corporation upon acquiring the possesion of the Northern Pacific estate at once placed upon the same a valuation many millions of dollars in excess of the actual cost thereof, as well as many millions in excess of the valuation which had been reported and returned for the same property immediately prior thereto whilst in the possesion or ownership of the Northern Pacific Railroad Company: Therefore

Resolved, That the President be, and he is hereby, requested to furnish to the Senate such information as may be obtainable from the Department of Justice, the Department of the Interior, and the Interstate Commerce Commission upon the matters herein referred to, and to inform the Senate whether on behalf of the Government, through the Department of Justice or otherwise, any investigation has ever been made as to the method of the so-called "reorganization" of the Northern Pacific Railroad Company under which the Wisconsin corporation, known as the Northern Pacific Railway Company, claims to have acquired the title to the Northern Pacific estate, and if so, with what result.

MODIFIED REPLY BRIEF OF APPELLANTS.

An examination of the record indicates that on every move by the appellants in this suit the opposition has been originated, initiated and filed by the attorneys for the Government and not the attorneys for the railway company, although in all but one or two instances the railway attorneys followed the Government attorneys.

It is hard to understand why the Government attorneys are so vigorously opposing this appeal as they state that the Government is not interested except as to expediency, which is no ground for refusing an appeal, unless they are peeved by the appellants' pointed criticism of the Attorney General for violating the mandate of the Statute of June 25, 1929 (46 Stats. 41; U. S. Code Title 43, Sections 921-925).

Counsel is surprised that anyone would oppose the granting of this appeal in the face of this Court's decision in *Cathay Trust, Ltd.,* vs. *Brooks,* 193 Fed. 973 (C. C. A. 9; *Richfield Oil Company* vs. *Sawtelle, Judge,* 279 Fed. 851 (C. C. A. 9); *Richfield Oil Co.* vs. *Western Machinery Co.,* 279 Fed. 852 (C. C. A. 9); and *Washington* vs. *United States,* 87 F. (2d) 421, on the intervention at 431 and 434 (C. C. A. 9), in which latter case the United States was a party as in the case at bar, and the Court said: "They assert, however, that they have no available remedy for the adjudication of title *because appellee (U. S.) has not consented to the bringing of a suit.* We believe and hold that the denial left the States no remedy to adjudicate the title to the island. The order denying the intervention was a practical denial of relief in that respect, and therefore the orders are appealable." (Italics supplied.)

The case at bar is "on all fours" with the case just quoted as far as the latter goes but in addition thereto the case at bar is a *special* and *specific statutory remedy* for the appellants provided by Congress and made *mandatory* by the use of the word "*shall*" (not just the word "may" which is only sometimes mandatory) and Congress *gave the consent* of the United States to be thus litigated therein.

The said Act of June 25, 1929, section 5, provides: "The attorney general is hereby authorized and *directed* forthwith to institute such suit * * * In the judicial proceedings contemplated in this act there *shall* be presented and the court or courts *shall consider and make findings* relating to and *determined* * * * including the legal effect of the foreclosure of any or all mortgages which the said Northern Pacific Railroad claims to have placed on said granted lands. * * * The said Northern Pacific Railroad Company or the Northern Pacific Railway Company or any other proper person *shall* be entitled to have heard and determined by the court all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies * * * and all other questions of law and fact presented to the Joint Congressional Committee * * * notwithstanding that such matters may not be speciafically mentioned in this enactment."

But a more pertinent decision as to the appellants' right to intervene in the present case could scarcely be found than that in *U. S.* vs. *Ladley,* 51 Fed. (2d) 756 (D. C. Idaho), a suit by the United States against a private individual to quiet title to property formerly the bed of a lake, title to which was claimed by the State of Idaho, where it was held: (1) that the state was a necessary party; (2) that its petition for leave to intervene should be granted; and (3) that the federal district court had jurisdiction notwithstanding the state's intervention as a necessary party. To quote from Judge Cavanah's opinion in that case: "The pleadings and the petition in intervention seem to agree that the main contest is between the United States and the state, as the only issue relating to their possession is whether the bed of the lake was navigable or nonnavigable. If the lake was nonnavigable, then the title of the state falls which carries with it the claim of the defendant who bases his claim upon the title of the state. So it is apparent that under Equity Rule 37, where the state is a necessary party and is permitted to intervene, which I think it has a right to and should be permitted to intervene, the court does not lose jurisdiction, because coming in voluntarily under that rule the state cannot object to the jurisdiction of the court. This construction of Equity Rule 37

and the state being a necessary party removes the objection as to the jurisdiction which might be made under Equity Rule 39. Of course the rights of all persons interested in the subject matter of the suit should be decided in the present litigation, and parties having an immediate interest in the subject ought to be made parties to the suit. The state is so situated in respect to this litigation that the court ought not to proceed in its absence, and, when brought in, the case would be between the United States on the one hand and the state on the other, with the defendant, one of the citizens of the state, contesting both the rights of the United States and the state. The interest of the state is of such a nature that a final decree could not be made in the action without affecting that interest, and it would be improper for a court of equity in the exercise of a fair discretion to proceed without it. *State of California* vs. *Southern Pacific Co.,* 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683; *New Mexico* vs. *Lane, et al.,* 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588; *Louisiana* vs. *Garfield,* 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92; *Percy Summer Club* vs. *Astle, et al.* (C. C.), 110 F. 486."

The Special Master under the decree of reference of May 24, 1932, stated in his report of May 31, 1933, which was confirmed by the decree of October 3, 1935, as amended January 29, 1936, five and one-half years after the suit was instituted, that "the Government neither by the bill nor in argument, is attempting to set aside the decrees of foreclosure or the sales had under those decrees".

The railway company had theretofore on January 18, 1932, forced the railroad company to "disclaim" any and all interest in the properties, assets and lands and on May 9, 1932, to file an answer adopting the answer of the railway company that the same belonged to the railway company.

The Attorney General in violation of his duty under the Act did not put the matters in issue required thereby and he assumed that the railway owned the property and prayed judgment in the bill against the railway and not against the railroad.

The appellants could not know until after the decree of January 29, 1936 (which lacked two days of being five

and one-half years after the bill was instituted), settling the pleadings whether or not the Attorney General would put the matters in issue and there was no occasion until then for the appellant railroad company, through minority stockholders, to file an answer or the intervening petitioners to file their petition.

Before the pending appeal was granted to the Intervening Petitioner, opposing counsel are attempted to draw a red herring across the trail seemingly in an effort to lead the Court to hear and determine on this application the questions that should be heard on the merits on the appeal after the appeal is allowed, which hearings should be in open court on oral argument, briefs and printed record with the opening and closing to the appellants, and the opposing counsel are not, as they should, restricting their argument solely to the question of whether or not an appeal is grantable. The plan opposing counsel was seeking to invoke and establish has never been authorized or approved by Congress or the Courts and we do not believe that this Court will now permit such proceedings, but as now one application for appeal has been granted, record printed and will be heard on oral argument with printed briefs, opposing counsel cannot object to the other as yet undetermined application being heard on same printed record, brief and oral arguments, and then granted and thereupon forthwith reversed or affirmed.

The Supreme Court of the United States has established the practice that where on motion to dismiss an appeal the Court feels that it might be well to consider the appeal on the merits before passing on the motion to dismiss or substantial jurisdiction, that it continue the hearing on the motion to dismiss until the hearing on the merits, thereby reserving to the appellant all the rights to a full oral hearing in Court on printed record and brief; then the Supreme Court has the record printed so that it will be available for the hearing on the question of jurisdiction as well as the merits.

We feel that this Court should certainly not permit itself on this application to be led to consider this appeal on the merits before granting appeal and then, in the event the Court should feel that the decrees appealed from should be affirmed and then deny the appeal and thereby cut appellants out of an opportunity or right to appeal to the Supreme Court of the United States on the merits as there would be no judgment of this Court, thus possibly burdening the Supreme Court with a petition for mandamus before there can be a petition for *certiorari.* This appeal should be granted and then either reversed or affirmed, and counsel are confident it should, and will, be reversed.

The "correct practice" is that the chancellor should "grant the appeal as a matter of course" where it is a question of whether the intervention is discretionary or mandatory, as was held in *United States* vs. *Phillips,* Ga. 107 Fed. 824 (C. C. A. 5), cited with approval by this Court in *Richfield Oil Company* vs. *Sawtelle, Judge,* above.

The above act shows clearly that Congress, after the decision in *United States* vs. *Northern Pacific Railway Company,* 256 U. S. 51, determined that the rights between the two companies should be settled by the Court in a proper suit and provided the remedy and the jurisdiction in Section 5 of the Act of June 25, 1929. And the Congress had, after the opinion of the Attorney General cited by the railway, passed the Act of July 1, 1898 (30 Stats. 620), holding that the questions were still open, which contained this provision: "And provided further, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and

nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted."

The appellant intervening petitioners and minority stockholders filing the answer and cross bill for the railroad company represent all of the stockholders of the Northern Pacific Railroad Company except the Northern Pacific Railway Company, which holds all the stock not held by the appellants and those associated with them. The interest of the appellants and those associated with them is worth some $3,000,000 to $4,000,000 and it is a very important matter, as evidenced by the fact that they began their efforts in 1898 or a little later to have a Congressional investigation of the foreclosure and mortgages of the Northern Pacific Railroad Company to obtain the evidence and the facts as to the foreclosures and mortgages and to obtain a statute similar to the one of June 25, 1929, in which the United States would be a party by its consent.

At every annual meeting from 1898 to and including 1937 these minority stockholders protested the wrongs done them and sought relief in such stockholders meetings, but all in vain.

In 1900 that distinguished Philadelphia attorney, the late John G. Johnson, Esq., filed a suit for one of those associated with these appellants in the United States Circuit Court for the Southern District of New York protesting the said foreclosures and mortgages and the rights of the minority stockholders and depositions were taken for some years, and that suit is still pending and on the docket, but it was known before the institution of the suit and realized during the pendency that there could not be the proper relief or a decision binding on all the parties and on the United States unless the United States was a party thereto.

Decisions of the Supreme Court cited in the answer and cross bill make it clear that no suit for the foreclosure, sale or conveyance of the railroad property and lands of the Northern Pacific Railroad Company could pass any

title or be valid and binding unless the United States was a party thereto.

Consequently, the appellants, intervening petitioners, and those associated with them again, as in 1898 or a little later, sought a Congressional investigation and they were persistently and continuously active and vigorous in seeking such investigation. Their effort was crowned with victory in 1924 and 1925 in obtaining the Joint Congressional investigation which resulted in the Act of June 25, 1929, and which investigation is referred to therein. But for such continued and faithful effort of the appellants that investigation and the resulting statute would never have been had. That statute and the report of the Committee show that Congress has given a mandate to the Attorney General and the Courts to find the facts and determine every issue or contention made before that Committee, whose hearings and Report consist of some 15 printed volumes of which this Court will take judicial notice.

In these hearings the railway company contended that the former opinions of the Attorney General and the case of *United States* vs. *Northern Pacific Railway,* 256 U. S. 51, settled the matter, but the Committee and the Congress determined otherwise. The statute established a special and specific jurisdiction and remedy, and provided that process could be sent to and served on parties in other districts than the one where the suit was instituted, and the statute restricted the district in which the suit could be instituted to certain districts in certain states traversed by the Northern Pacific (Sec. 7).

Congress made it mandatory that the Court make findings of fact on the validity and "legal effect of the foreclosure of any and all mortgages" and on all the other matters contested in the Congressional investigation, which included a dispute as to whether or not title could pass or had passed to the railway company.

Commissioner Graves, in his first report (R., 467), stated: "Thus the final decree may settle forever all dis-

putes which have existed up to the present time between the Government and the *railroad.*"

Then Congress required that the Attorney General make a report to Congress so that it would know how to legislate, Congress feeling, as its report and act indicate, that they wished a judicial determination of the disputes set out in the act and for a Court to determine whether or not the title was still in the railroad or had passed to the railway. Because this railway system is subject to special use of the United States for transporting the mail and troops, it was important for the Congress to know whether or not in the future it was dealing with the Federal corporation, the Northern Pacific Railroad Company, or the Wisconsin state corporation, the railway company.

The Attorney General, by failing to put the matters in issue, as the Master reported, and the railway company, by filing for the railroad the disclaimer and answer by the railroad company, are thus thwarting the purpose and intention of Congress.

The Joint Resolution Committee on April 29, 1929, reported to the first session of the Seventy-first Congress in Report No. 2 and stated: "Your committee reported to the Seventieth Congress, second session, a similar bill which, on February 21, 1929, was submitted to the Senate by Mr. Kendrick and to the House by Mr. Colton. The remarks of Mr. Colton made in the House in connection with the bill on March 2, 1929, which appear in the Congressional Record of March 12 (pp. 5294-5298) and March 15, 1929 (pp. 5431-5433), are, by reference, hereby incorporated in and made a part of this report. The committee unanimously recommends that the bill be passed."

* * * * *

"Extensive hearings have been had, at which representatives of the Department of Agriculture, the Department of Interior, and the Northern Pacific Railway Co. were present. The privilege of calling and examining witnesses and being heard in argument was extended *to all interested persons.* A numbr of witnesses have been called and examined and legal representatives of the governmental departments and of the company have been heard on the propositions of law and facts involved. Your committee

has made a detailed study of all the circumstances and facts connected with the points raised in this controversy and the law applicable thereto. Ninety-four days of hearings have been held and proceedings covering over 5,500 pages have been printed."

* * * * *

Note that there was no one representing the Northern Pacific Railroad Company at these hearings.

On page 5296 the committee stated: "That it is desirable that a speedy and final adjustment of the grants be had; *that the decision of the courts be obtained on the controverted questions of law and fact, and that the respective rights of the United States and the Northern Pacific Railroad Co. and/or its successor, the Northern Pacific Railway Co., be fully and finally established.*"

* * * * *

"The provisions of the bill may be summarized, in general, as follows: "By the first section all lands, surveyed, or unsurveyed, within the indemnity limits of the grants and within the exterior boundaries of national forest and other Government reservations are removed from the operation of the land grants and retained by the United States as part of the reservations *within which they are situate, relieved and freed from all claims, if any exist, which the Northern Pacific Railroad Co. or its successor, the Northern Pacific Railway Co.,* may have to acquire them as indemnity selections or otherwise, and provision is made that the railroad company or its successor shall be entitled to be *compensation* to the extent and in the amounts, if any, the courts hold compensation is due.

* * * * *

"Section 4 provides that the act shall not be construed as affecting the present title of the company or its successors *in the right of way,* acquired under the grants, or land actually used in good faith by the Northern Pacific Railway Co. in the operation of its road, such as lands used for depots, station buildings, work shops, machine shops, switches, side track, and water stations.

"Section 5 directs the Attorney General to institute proceedings to accomplish the objects mentioned therein and *in the act in its entirety.*

"Section 6 requires that an accounting be had and authorizes the rendering of such judgments and decrees as law and equity may require.

"Section 7 relates to the fixing of jurisdiction and to matters of procedure.

"Section 8 makes it the duty of the Attorney General to *report to Congress any final determinations rendered in the proceedings* and requires the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture to submit to Congress such recommendations for the enactment of legislation, if any, as they deem desirable in the interests of the United States in connection with the execution of said judgments and decrees, or otherwise."

* * * * *

"Your committee is of the opinion that the grantee railroad company and its successor are not now entitled to the same compensation from the United States they would have been entitled to receive had they made a full and complete compliance with the obligations that were contained in the act of Juyl 2, 1864, and the resolution of May 1, 1870, and which the grantee railroad company obligated itself to perform.

"Likewise, your committee is of the opinion that the grantee railroad company or its successor should not now be permitted to profit under the land grants at the expense of the United States through transactions that were collusive, fraudulent or otherwise illegal. The testimony taken at the hearings shows that there were such transactions. Your committee is of the opinion that the grantee railroad company or its successor is not entitled to any further lands from the United States."

Again, on page 5297: "It was, therefore, the unanimous opinion of your committee that the enactment of H. R. 17212 is necessary for the proper protection of the interests of the United States. The bill if enacted will permit the United States to go into the courts on a comprehensive basis and at the same time it will *afford* the *grantee railroad company or its successor an opportunity to be fully heard* in support of *such contentions* as it may desire to *make in opposition to any position taken by the United States* in the court proceedings.

"Under the first section of H. R. 17212 the United States retains title to the lands within the national forests and other Government reservations that might be subject to acquisition by the Northern Pacific Railway Co., in the event it should be found that there is an unsatisfied deficiency in the acreage of the grants. The section removes these lands from the operation of the grants and provides

that the railroad company shall be entilted to compensation in the event the courts find that compensation is due from the United States. This action is taken under the power reserved by Congress to repeal, alter, or amend the grants."

This shows that the committee believed the statute gave the railroad company the right to make any contentions it wished in opposition to the position taken by the Government in the Court proceedings.

Therefore, the Attorney General having in this suit taken the position and assumed that the railway company has title to and owns all the rights of way, road bed, land, land grants, and assets of the Northern Pacific Railway system, and that the railroad company has no right, title or interest whatever therein, the railroad company under the committee's construction of the Act, is entitled to be heard in Court contesting the position thus taken by the Attorney General, which position of the Attorney General to any open mind is a clear and unjustified violation of the mandate of the statute addressed not only to the Attorney General but to the Courts.

The committee stated as one reason for declaring a forfeiture that: "(c) the collusive sales of the granted lands in violation of and in evasion of the provisions of the resolution of May 31, 1870, in connection with the foreclosure of the mortgages coincident with the 1875 and the 1896 reorganizations of the Northern Pacific Railroad Co.

The United States was not a party to any of these proceedings."

The appellants could not know until after the decree of January 29, 1936, five and one-half years after this suit was instituted, whether or not the Court would require the putting in issue of the matters made mandatory by the statute. The Act of June 25, 1929, by its terms eliminates all questions of laches, and furthermore, property of the railroad company never taken into possession by the railway is now in the Court in this cause, and the railroad can, and it is fighting to, prevent the railway from getting possession of same.

On April 13, 1938, the judge of the lower court had the clerk write counsel for the railroad company by, &c., and for the appellants, in reply to counsel's request that they be notified of the time of hearing on the decree and findings of facts that were to be presented, which letter of the clerk is as follows:

"Dear Mr. Hudson:

Your air mail letter of April 11, addressed to Judge Webster, came to hand in due time and because of his continued illness has been turned over to me for attention.

Judge Webster is still confined to his home and we do not know definitely at this time just when he will be able to resume his duties. He is improving and hopes to be on the Bench on Saturday, April 23.

He directs he to say that the only questions to be considered at the April 23 hearing is the propriety of granting your appeals in the present state of the record and, if any appeals are appropriate in the circumstances, the precise questions which your clients may be permitted to raise.

No decree pursuant to his rulings on exceptions to the special master's second report has been presented for his consideration and it is not his purpose to give consideration to the decree on April 23. A later date will be fixed for considering decree after the proposed decree has been presented to him, *of which date you will be seasonably advised.*

Respectfully,
A. A. LaFRAMBOISE, Clerk.

CC to Mr. Edmiston
Mr. Boylan"

Notwithstanding this promise from the Court, the decree of August 1, 1938 (R., 1256), was entered confirming a stipulation between the Government and the railway company that the Government might file an amendment to its amended Bill, which was made a part of the stipulation and notwithstanding the written promise of the Government that it would not be presented until counsel for the appellants (and when we say counsel for the appellants we mean the railroad company by &c., and the intervening petitioner) had an opportunity to oppose it and to be heard, the decree was entered before counsel for the appellants, re-

ceived a copy of the stipulation and amendment and had an opportunity to oppose same—the whys and wherefores of how it was thus entered are set out in the joint motion of the appellants and the Northern Pacific Railroad by &c., to strike same filed August 29, 1938 (R., 1258).

On September 3, 1938, the railroad company by &c., filed an answer and cross-bill (R., 1240) to the said amendment to the amended bill of the plaintiff, which was filed August 1, 1938, (R., 1251-2-3), in which their motion to strike out the said decree and stipulation and amendment to the amended bill were reserved and made a part thereof and the motion to dismiss the amended bill as well as the amendment. This answer and cross bill adopted as a part thereof the former answer and cross-bill and the intervening petition. The government having thus filed an amendment to its amended bill without having complied with the mandate of the said act of June 25, 1929, removes any question as to the right of any party in interest at this time to file a motion to dismiss, answer or cross-bill, as the pleadings have not been completed, and the cause has not been heard on the merits.

The cross bill (R., 952) and petition (R., 1037) allege facts and sustain them with exhibits clearly showing that the 1896 foreclosure is null and void, and no title ever passed to the railway, and they cite and quote therein decisions of the United States Supreme Court so holding. (R., 992, 997, 1097-8-9, 1117-21, 1124, 1127, 1130.)

The Railroad Company and the railway company contended from 1875 to 1924 that the foreclosure of 1875 was a valid foreclosure and passed title, but in 1924 they changed their position and admitted that there was no foreclosure or passing of title in 1875, but simply an exchange of securities. Because of the disputes and this change in the position of the railway, Congress in the Act required a finding of fact and determination by the Courts as to the validity of the so-called foreclosure of 1875, and would not accept the 1924 admission of the railway company that there was not a foreclosure.

The allegations in the cross bill and petition show that under the decisions of the Supreme Court of the United States, cited therein, the so-called foreclosure of 1896 was not a foreclosure, nor did any title pass, but it was merely an exchange of securities somewhat similar to 1875, and filed exhibits sustaining same.

The cross bill and petition allege facts, and sustain them with exhibits, clearly showing that the railroad company title could not pass from it and that the railway company could not take or receive title under the laws of the United States and of the different states involved, and cited and quoted decisions of the Supreme Court of the United States so holding. (R., 1097-8-9, 1116-21, 1124, 1127, 1130.)

The cross bill and petition further allege that the railway was owned by the railroad in 1896, and that the railway only took possession and did not take title to the railroad property and lands, that the mortgage of July 1, 1870, was not a lien on the roadbed and right of way, that all mortgages since 1870 are null and void and many other matters, and that the railway is simply a trustee, holding company, or operating company, for the railroad company, and cite and quote decisions of the Supreme Court of the United States so holding.

The cross bill and petition allege that the minority stockholders and intervening petitioners hold preferred stock of the railroad company, which is a debt as well as stock, and under the Boyd case the Supreme Court held as to them that the 1896 proceedings were void (R., 986-7).

If the said decrees mean and can only be construed to mean, as contended by the Government and by the railway company before the Supreme Court, that the appellants were put out of court by the District Court and are no longer parties thereto, then the decrees are clearly final decrees.

If the decrees mean and can only be construed to mean that the appellants were put out of court by the District Court as to part of their cause of action, that is, to obtain recovery of all the railroad property and assets, and were

only left in court as to the fund to be established by the lower court, if any, then the decrees are still final decrees.

But if the decrees mean that the District Court did not put these appellants out of Court on any matters but permitted them to remain in Court, and that if and when the fund is established then the Court shall determine all the causes of action and the title to and right of possession of all of the railroad property, lands and assets and forever settle the question of title and possession and make findings of fact as required by the Act, then it might be construed that the decrees are interlocutory.

Counsel do not think this latter proposition is a tenable position, because if no fund is established by the District Court, then it could be questionable whether or not the entire issue between the rialroad and the railway company could be heard in the suit still pending in the District Court.

For these reasons appellants feel that the two decrees are final decrees and this Court should grant the appeals and review and reverse the District Court and direct it to carry out the mandate of Congress requiring the District Court to settle all the disputes between the railroad and the railway company and make findings, as mandatorily required by the Act of June 25, 1929.

As alleged in the cross bill and petition, citing decisions of the Supreme Court to sustain same, there can be no valid binding suit or decree affecting the properties of the Northern Pacific Railroad system unless the United States is a party thereto and, as stated heretofore, appellants were fighting for over 25 years to obtain authority from Congress for such a suit consenting to the United States being a party thereto, and this suit is the result of such effort. (R., 1097, 997.)

As the United States is a party and this is the only suit that can determine the matter, and Congress made it mandatory to have a finding of fact and determination by the Courts as to the validity of the mortgages, the title and many other matters, including all the rights of these par-

ties, the said decrees striking the answer and the cross bill are each clearly final and appealable under the decisions of the Supreme Court of the United States and decisions of this Court, cited above, and other courts. In *United States* vs. *California Co-operative Canneries,* 279 U. S. at 556; 73 L. Ed. 841, the Court held and said: "It did not refer to the decisions which hold that an order denying leave to intervene is not appealable (citations) except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit (compare *French* vs. *Gapen,* 105 U. S. 509, 524-526, 26 L. Ed. 951, 956, 957; *Smith* v. *Gale,* 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 674; *Leary* vs. *United States,* 224 U. S. 567; 56 L. ed. 859, 38 Sup. Ct. Rep. 599; *Swift* vs. *Black Panther Oil & Gas Co.,* 136 C. C. A. 448, 244 Fed. 20, 30)."

In *Credits Commutation Co.* vs. *United States,* 177 U. S. at 315, 44 L. ed. at 785, the Court stated and held: "It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial *of certain relief to which the intervener is fairly entitled, and which he can only obtain by intervention.*

* * * * * *

"In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief."

This case was cited and approved in the following cases:

Illinois Steel Co. vs. *Ramsey,* 176 Fed. 853 at 863, 100 C. C. A.—8 323, and *Western Union Telegraph Co.* vs. *United States & Mexican Trust Co.,* 221 Fed. 562, 137 C. C. A.—8 113, both holding claimant of lien on specific property in exclusive control of court has right to intervene and denial of petition therefor is reviewable; *Central Trust Co.* vs. *Chicago, etc., R. Co.,* 218 Fed. 336 at 339, 134 C. C. A.—2, 144, orders denying intervention of nondepositing bondholders in proceedings to foreclose mortgage on railway stock, which disposed of petitioner's claims, are final and appealable. In the instant case the non-depositing minor-

ity stockholders are attacking same after sale and under a special statute giving such authority, appellants having alleged and shown by exhibits that the sale was void and there was only an exchange of stock.

United States vs. *Northwestern Development Co.*, 203 Fed. 960 at 952, 122 C. C. A.—9 252, where petition in intervention was dismissed in final judgment in an action at law as not stating cause of action, judgment was reviewable on writ of error.

United States Trust Co. vs. *Chicago, etc, R Co.*, 188 Fed. 292 at 296, 110 C. C. A.—7 270, order denying petition to intervene where intervention was matter of right, held reviewable. This case cites *Minot* vs. *Martin,* 95 Fed. 734 (C. C. A.—3).

Washington vs. *United States,* above was cited and followed in *Carroll* vs. *New York Life Ins. Co.,* 94 F. (2d) 333, (C. C. A.—8).

The case cited by the railway attorneys, *O'Connell* vs. *Pacific, etc., Co.,* (C. C. A.—9) 19 F. (2d) 460, not only is a discussion of the merits and not proper here but the Court there also said there was no fraud or bad faith or conspiracy and that there was no statute on which to base the intervention like the statute here of June 25, 1929.

Another case cited, *Barcelоux* vs. *Buffam,* 51 F. (2d) 82, (C. C. A.—9 is not applicable, as the rights of the intervening petitioners, the Court states, were *"being actually litigated in good faith by the respondent corporation."* Also it was a case on the merits, as there was no question of an appeal raised; in the case at bar the rights of the appellants are not being litigated by either the Government or the railway company, but on the other hand, the railway company forced the abandonment of any rights of the railroad company or its stockholders by filing for it while in captivity, on January 18, 1932, a disclaimer as follows:

"DISCLAIMER OF NORTHERN PACIFIC RAILROAD COMPANY.

Defendant Northern Pacific Railroad Company, a corporation organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365) says that it does not claim or pretend to have any right, title or interest in the subject matter of this suit as set forth in the original bill of complaint as amended, or any part thereof, and this defendant disclaims any right, title or interest in said subject matter and every part thereof.

Wherefore this defendant prays that the original bill of complaint as amended be dismissed as to it."

The railway company likewise holding the railroad company in captivity, had filed for the railroad company through the railway attorneys on May 9, 1932, an answer as follows, which was really an answer to the amended bill: "Now comes the defendant Northern Pacific Railroad Company, a corporation, and for its answer to the bill of complaint says: "It admits that it is a federal corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), and has an office in the City of New York. Denies that it is engaged in business.

"Defendant abides by, adopts and makes a part of this answer the amended and supplemental answer filed herein by defendant Northern Pacific Railway Company."

The railway company's amended and supplemental answer claims to own all the lands and property or that they are owned by other corporations, all the stock of which the railway company owned, and then the answer prayed: "That the court determine the compensation due to the Northern Pacific Railway Company for the lands expropriated by the United States by the Act of June 25, 1929, and enter its decree in favor of this defendant for the sum so found, together with interest thereon from the 25th day of June, 1929. Defendant further prays that the court dismiss the bill of complaint as to all other matters therein set forth."

It was not necessary for appellants nor for any minority stockholders to obtain leave to file an answer and cross bill; a cross bill can be filed by the minority stockholders just the same as they can file an original bill where the corporation is not protecting its rights. This seems clear

from the principles enunciated in *Ashwander* vs. *TVA,* 297 U. S. 288, 80 L. ed. 688, where the Court stated: "Plaintiffs *sue in the right* of the *Alabama Power Company.* They sought unsuccessfully to have that right asserted by the power company itself and upon showing their demand and its refusal they complied with the applicable rule." (Italics supplied.)

In *Carter* vs. *Carter Coal Company,* 298 U. S. 228 at 286; 80 L. ed. 1160 at 1177, the Court held and said: "First In the Carter Case (Nos. 636 and 651) the stockholders who brought the suit had formally demanded of the board of directors that the company should not join the code, should refuse to pay the tax fixed by the act, and should bring appropriate judicial proceedings to prevent an unconstitutional and improper diversion of the assets of the company and have determined the liability of the company under the act. The board considered the demand, determined that, while it believed the act to be unconstitutional and economically unsound and that it would adversely affect the business of the company if accepted, nevertheless it should accept the code provided for by the act because the penalty in the form of a 15% tax on its gross sales would be seriously injurious and might result in bankruptcy. This action of the board was approved by a majority of the shareholders at a special meeting called for the purpose of considering it."

* * * * * *

"The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in *Ashwander* vs. *Tennessee Valley Authority,* 297 U. S. 288, 80 L. ed. 688, 56 S. Ct. 466 (February 17, 1936), and *requires no further discussion.*" (Italics supplied.)

Thus the Supreme Court *foreclosed* any further contentions against the right of Minority stockholders to file a suit (which includes a cross bill) *"in the* right of the" Corporation, as appellant did in the present answer and cross bill.

There is nothing in the books or cases distinguishing the right for such stockholders to file a cross bill from the right to file an original bill.

The Court recognized the appellants as parties by

denying, (which goes to the merits) and not striking out, the motion to dismiss the bill because it did not comply with the statute, and also denying and not striking out, appellant's motions to construe and amend the Master's Report to determine the ownership of the property. The Government's brief, page 10, sets out part of the order and a statement of Judge Webster on April 30, 1938 as follows: "And that counsel presenting said petition for appeal are not authorized to represent said Northern Pacific Railroad Company or any other party to this suit."

This is certainly final and appealable as denying all rights of appellants. This is Judge Webster's construction of his own decrees of March 9 and 22, 1938, and the Government and railway are estopped to deny same, as they asked for and prepared the decrees.

As the cross bill and petition to intervene were signed and sworn to by one of the minority stockholders, it cannot be said that counsel were not authorized by the appellants to file same nor is there anything in the record elsewhere to justify such a statement by the Court either as to the authority of counsel or of the appellants, and it indicates the state of mind as well as mental attitude or antipathy of the lower court to the appellants and their duly chosen counsel. Under *Ashwander* vs. *TVA,* above there can be no question of the authority of Minority stockholders of the Railroad Company for filing the cross bill as well as the intervening petition.

In Paragraph 2, page 10, of the Government's brief, it is stated that the decree of April 30, 1938, was not disclosed to the Supreme Court. The statement is incorrect and utterly absurd. The Court was fully advised of it; it was discussed by counsel for the Government and the appellants with the law clerk of the Chief Justice, who was getting information for the Chief Justice, and who indicated that if the appeals were not allowable, then the order of March 23, 1938, was void and could be stricken at any time, and it was needless to discuss the decree of April 30, 1938. But that decree was presented in appellant's peti-

tion for appeal to the Supreme Court, and in the railway company's brief.

The statement on page 17 of the Government's brief that there is no contention that the railroad and railway companies are not adequately presenting their claims against the Government is incorrect, as the contention was made vigorously in the Supreme Court and is shown by the record and will be made in this Court.

The action of the railway company through its attorneys by having entered the decree of August 1, 1938 (R., 1256), as set out in the motion of the Northern Pacific Railroad Company by minority stockholders and by the intervening petitioners filed August 29, 1938 (R., 1258), indicates a determined effort of the railway company to thwart the railroad company as well as the minority stockholders, and deprive both of their rights, and to continue the captivity of the railroad company and take all the profits for the railway company by stipulation and decree with the Government, which pretends to recognize all the right and property as being in the railway company and none in the railroad company. Thus the railway company and the United States are undertaking, by agreement, without the consent of the railroad company, to determine the ownership of the railroad, the lands and all the properties and rights of the railroad company under the grant and those otherwise obtained, to be the property of the railway company and thus not permit the Court to make a finding of fact or determination as to same as required by the act.

On the same page of the same brief it is stated that there is no reason given for the necessity of the United States being a party. That statement is incorrect, for the necessity therefor is fully set out in the record and heretofore and hereafter in this brief.

The statement on page 16 of the Government's brief as to contentions being ridiculous is without any merit, as the decree of March 22, 1938, modified the decree of March 9, 1938, and the cases heretofore cited clearly hold that minority stockholders are proper parties and the judge, in his decrees denying the motions, made them parties.

The Government urges on pages 1, 16 and 22 of its brief, and the railway company in its brief urges, that

these appeals not be granted as it would be inexpedient. This Court in cases heretofore cited, as well as the Supreme Court, has held that if the Court has jurisdiction the appeal is a matter of right and expediency can have nothing to do with it. No *supersedeas* has been or will be asked for on these appeals and as long as there is not a *supersedeas,* the appeal cannot and will not in any way interfere with the lower court in proceeding with the matters before it, nor will it in any way interfere with the appeal that the Government and the railway state they will take to the Supreme Court of the United States, which appeal appellants think has been lost by the carelessness of the railway company, as no appeal was taken within 60 days from March 22, 1938, as required by the Act of May 22, 1936. Council do not see that the case of *Century Indemnity Co.* vs. *Nelson,* 82 L. ed. 535, will save the appeal.

On page 11 of the Government's brief the statement is made that the appellants did not ask Judge Webster for an appeal from the decree of March 9, 1938 (R., ...), which statement is absolutely contrary to the truth and fact, as the petition to Judge Webster, filed May 24, 1938, prays an appeal from that decree; a copy of the petition which shows the same on page 1 was in the record presented to Judge Wilkins (This petition is in the record, as is also the decree of April 30, 1938, but they are not printed.)

Opposing briefs are more in the nature of a plea for mercy rather than a calm judicial discussion of this Court's jurisdiction in the instant case.

In *Alaska Packers Association* vs. *Pillsbury,* 301 U. S. 174 at 177; 81 L. ed. at 989, the Court said: "While an appeal in a proper case is a matter of right the question of whether the case is a proper one under the law regulating appeals is not to be left to the appellant but is to be examined and primarily determined by the Court or judge to which the application is made."

Nor is it left to the appellees. But this Court will determine from the Act of June 25, 1929, and the appeal stat-

ute, U. S. Code Title 28, section 225, and the former decisions of this Court and of other courts cited herein as a matter of law whether or not the appellants are entitled to the appeals prayed for.

This Court in *Washington* vs. *United States* above stated at page 435: "We conclude that the states are *without remedy* to *litigate* title to the island *against* the *United States*, and therefore the orders denying intervention to the states were final orders and appealable. We further conclude in reviewing the action of the court in disposing of the rights of the states to intervene, that the court erred in denying leave to intervene for the following reasons: (1) That the states are without remedy to litigate title to the subject of the suit, if intervention is denied; (2) that each state claims 'an interest in the litigation;' and (3) that the intervention will 'be in subordination to, and in recognition of, the propriety of the main proceeding,' under either construction of that language. Because of these reasons, the states have shown an absolute right to intervene, and the trial court had no discretion in regard thereto."

Counsel feel confident that the Court will be constrained to grant an appeal to the Northern Pacific Railroad Company by Schmidt and other minority stockholders to each of the following decrees entered by the District Court on May 24, 1932, October 3, 1935, the decree amending same on January 29, 1936, March 9, 1938, and the two decrees on March 22, 1938.

Respectfully submitted,

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CHAPTER 191.

An Act relating to railroads and amendatory of section 1833 of the Wisconsin statutes for the year 1898.

Section 1. Section 1833 of the Statutes of 1898 is hereby amended by adding after the word "operate" on the 13th line of said section on page 1352 of the Statutes of 1898 the following: "Any corporation taking any such conveyance or lease shall have all the rights, privileges and

immunities and be subject to all the duties, restrictions, of the corporation making such lease or conveyance", so that said section when so amended shall read as follows:

Section 1833. Any railroad corporation organized and existing under the laws of the territory or state of Wisconsin, or existing by consolidation of different railway companies under said laws, and the laws of any other territory or territories, state or states, may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when their respective railroads can be lawfully connected and operated together, to constitute one continuous main line, with or without branches, upon *suc* terms as may be agreed upon and become one corporation by any name selected, which within this state shall possess all the powers, franchises and immunities, including the right of further consolidations with other corporations under this section, and be subject to all the liabilities and restrictions of this chapter, and such in addition, including land grants and exemptions of land from taxation as such corporations peculiarly possessed or were subject to at the time of consolidation or amalgamation by the laws then in force applicable to them or either of them. Articles stating the terms of consolidation shall be approved by each corporation, by a vote of the stockholders owning a majority of the stock in person or by proxy, at either a regular annual meeting thereof or a special meeting called for that purpose in the manner prescribed by section 1826 or by the consent in writing of such stockholders annexed to such articles; and a copy thereof, with a copy of the records of such approval, or such consent, and accompanied by lists of their stockholders, and the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals of such corporations affixed, shall be filed for record in the office of the secretary of state before any such consolidation shall have validity or effect. Any such railroad corporation may give or take a lease, or may sell to or purchase from any railroad company, or at any judicial sale within or without the state, and give or take a conveyance or assignment of the railroad, franchises, and immunities together with the appurtenances and all other property, and the stock or bonds or both thereof, of any railroad corporation, whether organized or created by the laws of this state or any other state or of the United States, or any portion thereof, within or without this state, when

their respective railroads can be lawfully connected and operated together, to constitute one continuous main line, or when the road so purchased or leased will constitute a branch or feeder of or be connected with or intersected by any line maintained or operated by such purchasing or leasing corporation, or which said purchasing or leasing corporation is authorized to build, own, maintain and operate. Any railroad corporation existing under the laws of this state may purchase and hold the stock or bonds of any other railroad corporation described in this section or many purchase and hold the stock or bonds of any railway company to which it was furnished the money for the construction of its railway, for the money so furnished, or for such other consideration as may be agreed upon between the companies by their respective boards of directors, it may purchase and may take a conveyance of the whole or any portion of the franchises of any such corporation, and of the railway property and appurtenances thereof, any stock or bonds which shall have been issued by any purchasing corporation in consideration of any property by it purchased as authorized by this section shall be deemed fully paid. All acts, purchases, whether at judicial sale or otherwise, and conveyancies heretofore or hereafter made by or to any railway company organized under the laws of this state, which are authorized by this section, and all conditions and agreements upon which the stocks and bonds of any such corporation have been and are to be issued, including any and all terms and conditions as to price, voting power, dividends and trustees, or otherwise and any between different classes of stock or otherwise and all issues of stock and bonds in accordance with such terms, conditions and agreements, are hereby in all things legalized, ratified, and confirmed; provided, that nothing herein contained shall be construed to legalize any contract of lease heretofore entered into between a corporation of this state and any corporation organized or created by the laws of the United States. But no railroad corporation shall consolidate with, or lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights, or property thereof, which owns or controls a parallel and competing railroad to and with the railroad owned and controlled by such purchasing railroad corporation to be determined by jury.

Section 2. This act shall take effect and be in force

from and after its passage and publication. Approved April 18, 1899.

Chapter 198—Page 306, April 18, 1899.

An act relating to corporations and amendatory of Section 1788 of the Wisconsin statutes for the year 1898.

Section 1—Section 1788, of the Wisconsin statutes is hereby amended so as to read as follows: Purchasers of corporate rights may re-organize. Section 1788. Any person or association of persons, which shall have or may hereafter, become the owner or assignee of the rights, powers, privileges and franchises of any corporation created or organized by or under any law of this state, by purchase under a mortgage sale, sale in bankrupt proceedings, or sale under any judgment, order, decree, or proceedings of any court in this state, including the courts of the United States sitting herein, may, at any time within two years after such purchase or assignment, organize anew by filing articles of organization as provided in this chapter or elsewhere in these statutes respecting corporations for similar purposes, and thereupon shall have the rights, privileges and franchises which corporation had, or was entitled to have, at the time of such purchase and sale, and such as are provided by these statutes applicable thereto. They may fix at what price, or for what number of shares, the rights, privileges, powers, franchises and property of such former corporation purchased by them shall be put into the new organization.

"Any railroad corporation existing under the laws of this state, with the authority or the approval of the holders of a majority of the shares of its capital stock given either in writing or at a meeting called for that purpose, may purchase any railroad and other property, franchises, rights and immunities, in this or any other state or states, of any insolvent railroad corporation whose railroad shall be sold at morggage sale, or in bankruptcy or upon any other judicial sale, provided that the railroad so purchased shall not be parallel or competing with any constructed railroad owned or controlled and operated by the purchasing corporation, and shall be a continuation of, or be connected with, or intersected by, a line of railroad owned, leased or operated by such purchasing corporation, or which it shall be authorized to build; and in consideration of such railroad and other property, franchises, rights and immunities, so purchased, any such purchasing railroad

corporation may issue and deliver its own bonds and shares of its capital stock, *in such amounts* and at such prices, and on such terms and conditions, including any terms and conditions as to voting power and dividends in respect of any such stock as shall be so approved by the holders of a majority of the stock of such purchasing railroad corporation; and any and all purchases, and issues of stock and of bonds such as are authorized by this act, heretofore made by any railroad corporation existing under the laws of this state are hereby legalized and confirmed."

In *Ritchie* vs. *Sayers,* 100 Fed. 521 (D. C.—W. Va.) the Court held where the statute expressly provides "that no sale of real estate attached shall be made until the plaintiff, or some one for him, shall give bond with sufficient security, in such penalty as the court shall approve, with conditions," etc.) Code W. Va. 1868, c. 106, paragraph 23), a sale of real estate without such bond being given or required to be given will not only be made without authority from the statute, but against the express and positive command of it, and will confer no title upon the purchaser.

Although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree and the particular judgment thereon that it did enter, then that decree and judgment may be collaterally impeached.

And the Court said "It has been repeatedly held that a judgment of a court of competent jurisdiction, rendered without authority of law, is a nullity. *City of Chrleston* vs. *Boller*, 45 W. Va. 44, 30 S. E. 152; *Norfolk & W. Ry. Co* vs. *Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414; *Wilkinson* vs. *Hoke*, 39 W. Va. 403, 19 S. E. 520; *Manufacturing Co.* vs. *Carroll*, 30 W. Va. 532, 4 S. E. 782; *West* vs. *Ferguson,* 16 Grat. 270; *Styles* vs. *Coal Co.,* 45 W. Va. 374, 32 S. E. 227."

* * * * * *

"The whole scheme and object of the bill is to attach those deeds, claiming that they are fraudulent and void, and for this reason it is not a collateral attack, but a direct effort upon the part of the plaintiffs in this action to vacate those deeds; but, even if it were an attack upon the proceeedings of the court, 'it is an axiom of the law that judgments entered without any jurisdiction are void, and will be so held in a collateral proceeding,' as stated by the American and English Encyclopedia of Law (Volume 12, p. 147);

and this authority says that it is hornbook law, and cites a number of cases, both English and American, in support of this position.

In the case of *Risley* vs. *Bank,* 83 N. Y. 318, the court held that where a court was authorized by a statute to entertain jurisdiction in a particular case only, and undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction, and its judgment is a nullity and will be so treated when it comes in question, and can be attacked either directly or collaterally.

In the case of *Paul* vs. *Willis,* 69 Tex. 261, 7 S. W. 357, the court holds that a void judgment is always subject to collateral attack, and it can derive no legal sanction, even from the lapse of time."

* * * * * *

"It is a well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree and the particular judgment thereon that it did enter, then that decree and judgment may be collaterally impeached. *United States* vs. *Walker,* 109 U. S. 258, 3 Sup, Ct. 277, 27 L. Ed. 927; *Ex parte* Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *Ex parte* Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; *Lewis* vs. *Allred,* 57 Ala. 628; *Folger* vs. *Insurance Co.,* 99 Mass. 267; *Fithian* vs. *Monks,* 43 Mo. 502; *Seamster* vs. *Blackstock,* 83 Va. 232, 2 S. E. 36; *Anthony* vs. *Kasey,* 83 Va. 338, 5 S. E. 176."

In holding that the United States circuit court could make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby, the court said in *Gregory* vs. *Stetson,* 133 U. S. 579, 586, 33 L. Ed. 792. (The Rule as to who *shall be* made parties to a suit in equity is thus stated in Story's Equity Pleading, Section 72): 'It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed) that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, *to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done,* either to the parties before it, or to others, who are

interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but is may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.' See also 1 Daniell's Ch. Pl. and Pr. 246 *et seq.*''

'* * * It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental.'

* * * * * *

'The point was made in the court below, and it is also pressed here, that, Mrs. Pike being a nonresident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was therefore unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, notwithstanding the Statute referred to and the 47th Equity Rule, a circuit court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. *Shields* vs. *Barrow,* 58 U. S. 17 How. 130, 141, 142, (15: 158, 162); *Coiron* vs. *Millaudon,* 60 U. S. 19 How. 113, 115 (15:575) and cases there cited.

'But even admitting the complainant's contention as regards the making of Mrs. Pike a party to this suit, it does not follow that Talbot and Brooks should not have been made parties. As we have shown, they had a substantial interest in the subject matter of the contract sued on, and they should have been made parties to the suit'

In the Rose's Notes, page 1081, listing cases following above decision it is stated: ''*United States* vs. *Northern Pac. R. Co.,* 134 Fed. 720, 67 C. C. A. 269, dismissing bill by United States to annul contract between certain corporations, where one of them not inhabitant of district where suit brought.''

California vs. *Southern Pacific Co.,* 157 U. S. 229; 39 L. ed. 683, was a suit brought by California as complainant, directly in the United States Supreme Court against the Southern Pacific Company as defendant, wherein complainant prayed as here that it be adjudged the owner of the premises, etc. It appeared from the proceedings that the

city of Oakland and the Oakland Water Front Company claimed title to property not directly in the litigation, but which they claimed through the same original grant as that through which the defendant claimed title, but were not joined as parties defendant. The court held that such city and corporation were so situated in respect of the litigation, that the court ought not to proceed in their absence; and as, if they were brought in, the case would then be between the State of California, on the one hand, and a citizen of another state and citizens of California on the other, the court could not, under such circumstances, take original jurisdiction of it.

It was held:

"1. A court cannot adjudicate directly upon a party's right, without the party being actually or constructively before the court.

"3. In a suit in equity in this court, by the state of California against the Southern Pacific Company, a corporation and citizen of Kentucky, for a decree that the state is the owner of all the Oakland water front and that the defendant has no estate or interest therein and that the town of Oakland had no authority to grant or convey the same, the city of Oakland, the successor of the town of Oakland and the Oakland Water Front Company are necessary and indispensable parties.

"4. Where there are indispensable parties that are not made parties to a suit in equity in this court and the making them parties would oust its jurisdiction, the suit will be dismissed for want of such parties who should be joined but cannot be without ousting the jurisdiction."

The Court said:

"And if the proceedings which purported to vest title in the Oakland Water Front Company were held ineffectual for the same reason, then the latter company would find the foundation of its title swept away in a suit to which it also was not a party."

If the 1896 suits were valid then the rights of the United States in all the unsurveyed and unpatented lands that the Railroad Co. was entitled to under the grants were "swept away" by the foreclosure decrees.

"This is not an action of ejectment or of trespass *quare clausum*, but a bill in equity, and the familiar rule in equity, as we have seen, is the doing of complete justice by deciding upon and settling the rights of all persons

materially interested in the subject of the suit, to which end such persons should be made parties."

"We are constrained to conclude that the city of Oakland and the Oakland Water Front Company are so situated in respect of this litigation that we ought not to proceed in their absence."

The Court also said at page 695: "It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court (*Marbury* vs. *Madison*, 5 U. S. 1 Cranch, 137, 173, 174 (2:60, 72)) and no attempt to do so is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but, whether, where the Constitution provides that this court shall have original jurisdiction in case in which the state is plaintiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a state and citizens of another state and of the same state. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction. Bill dismissed."

In *Carroll* vs. *N. Y. Life Ins. Co.*, 94 F. (20) 333 (C. C. A. 8), a suit was brought by the Insurance Company to cancel the reinstatement of an Insurance policy (after it had lapsed because of non-payment of premium) due to false rpresentations in the application for reinstatement.

Deceased attempted to change the beneficiary from his estate to his wife after the reinstatement and also after notice by the company that they cancelled the reinstatement. Wife was co-executor of estate with another, and so was a beneficiary under the original provision of the policy, and the *sole* beneficiary under the change if it were effective.

Company didn't make wife a party defendant in her individual right and it is upon this ground that judgment for the company is appealed from.

Decision reversed, court citing *State of Washington* vs. *United States*, 87 F. (2d) 421 (C. C. A. 9), and other cases and saying: "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that

its final termination may be wholly inconsistent with equity and good conscience", and held that where a person has an interest "of a nature such that a final decree could not be made without affecting that interest and perhaps not without leaving the controversy in a condition wholly inconsistent with that equity which seeks to put an end to litigation by doing complete and final justice", such person is to be regarded as an indispensable party "within the quoted long-established rule".

In *Eastern Transp. Co.* vs. *United States*, 272 U. S. 665; 71 L. Ed. 472, at 475, the Court said:

"The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires. It was this view which led us in *Blamburg Bros.* vs. *United States,* 260 U. S. 452, 67 L. Ed. 346, 43 Sup. Ct. Rep. 179, to hold that as the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted, the act did not apply in cases in which the seizure of a merchant vessel of the United States could not be prevented by the act in a foreign port and court where the immunity declared by Congress could not be given effect."

In *Reid* vs. *United States,* 211 U. S. 529; 53 L. Ed. 313 at 315, the Court said:

"Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose. *Kawananakoa* vs. *Polyblank,* 205 U. S. 349, 353, 51 L. Ed. 834, 836, 27 Sup. Ct. Rep. 526. It has given a restricted permission, and has created a pattern jurisdiction in the court of claims, with a limited appeal. The right to take up cases from that court by writ of error still is limited as heretofore. It would not be expected that a different rule would be laid down for other courts that, for convenience, are allowed to take its place, when originally the rule was the same. It does not seem to us that Congress has done so unlikely a thing."

In *Choctaw Nation* vs. *United States,* 119 U. S. 1, 30 L. Ed. 306 at 314, the Court said:

"In reviewing the controversy between the parties presented by this record, it is important and necessary to consider and dispose of some preliminary questions. The first

relates to the character of the parties, and the nature of the relation they sustain to each other. The United States is a sovereign Nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its Government is limited only by its own Constitution, and the Nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign Nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the Act of March 3, 1871, embodied in Section 2079 of the Revised Statutes, to exert its legislative power.

As was said by this court recently in the case of the *United States* against *Kagama,* 118 U. S. 375, 383 (*ante,* 228): "These Indian Tribes are the wards of the Nation; they are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection; because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, by Congress, and by this this court, whenever the question has arisen."

It had accordingly been said in the case of *Worcester* vs. *Georgia,* 6 Peters 582 (31 U. S. bk. 8, L. Ed. 508): "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The recognized relation between the parties to this

controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the eleventh article of the Treaty of 1855, the Government of the United States expresses itself as being desirous that the rights and claims of the Choctaw People against the United States "shall receive a just, fair and liberal consideration".

In *Den* vs. *The Hoboken Land & Improvement Co.*, 59 U. S. 272; 15 L. Ed. 372 at 377, the Court said:

"At the same time there can be no doubt that the mere question whether a Collector of the Customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the

former in obedience to legal process, still Congress may provide by law that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs, and they may do to such extent, and with such restrictions, as may be thought fit.

When, therefore, the Act of 1820 enacts, that after the levy of the distress warrant has been begun the Collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future procedings dependent on th judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extrajudicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebedteness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

The Charles River Bridge vs. *The Warren Bridge, et al.,* 36 U. S. 11; 9 L. Ed. 773 at 823.

This brings us to the Act of the Legislature of Massachusetts of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge"; and it is here and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court thinks there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of *The Proprietors of the Stourbridge Canal* vs. *Wheely, et al.,* the court says, "the canal having been made under an act of Parliament, the rights of the plaintiffs are

derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this—that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act". And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal, were expressly secured by the act of Parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the docks", and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

* * * * *

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction, above stated, fully established. In the case of *The United States* vs. *Arredondo,* 8 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized, that in grants by the public nothing passes by implication.

The rule is still more clearly and plainly stated in

the case of *Jackson* vs. *Lamphire,* in 3 Pet. 289. That was a grant of land by the State; and in speaking of this doctrine of implied covenants in grants by the State, the court *use* the following language, which is strikingly applicable to the case at bar: "The only contract made by the State is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do, or not to do any further act in relation to the land; and we do not feel ourselves at liberty in this case, to create one by implication.

Thomas vs. *West Jersey R. R. Co.,* 101 U. S. 71, 25 L. Ed. 950 at 952, the Court held and said:

"It is next insisted, in the language of counsel, that though this may be so, a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter.

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the *enumeration of these powers implies the exclusion of all others.*

This class of subjects has received much consideration of late years in the English courts, and counsel, on both sides of the present case, have relied largely on the decisions of those courts. Among the cases cited by both sides is that of *E. Anglian R. Co.* vs. *Eastern Co. R. Co.,* 11 C. B. 775.

In that case the Eastern Counties Railway Company had made a contract in which, among other things, it covenanted to take a lease of several other *railroad* whose companies had introduced into Parliament a bill for consolidation under the name of East Anglian Railway Company, and to assume the payment of the parliamentary expenses of this Act of consolidation

This covenant was held void as beyond the power conferred by the charter. They cannot, said the Court, "engage in a new trade, because they are incorporated only

for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be the object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority. This case, decided in 1851, was afterwards cited with approval by the Lord Chancellor in 1857 in delivering the opinion of the House of Lords in the case of *R. Co.* vs. *Hawkes,* 5 H. L. Cas. 331; and it is there stated that it was also acted on and recognized in the Exchequer Chamber in the case of *McGregor* vs. *R. R.,* 2 L. J. (N. S.) Q. B. 69. Both these cases are cited approvingly in the opinion of Lord Cairns in the case of Ashbury Company, on appeal in the House of Lords."

"This latter case, as decided in the Exchequer Chamber (*Riche* vs. *R. C. & I. Co.*), L. R. 9 Exch. 224, is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed.

But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborn, Chelmsford, Hatherly and O'Hagan, and the broad doctrine estabilshed that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of everyone of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords *represents the decided preponderance of authority,* both in this country and in England, and *is based upon sound principle.*

There is *another principle of equal importance* and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it shows very clearly that the Railroad Company was without the power to make such a contract."

"That principle is, that where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, *without the consent of the State, to transfer to others the rights and powers conferred* by the charter, and *to relieve the grantees of the burden* which it imposes, is a *violation of the contract with the State, and is void as against public policy.* This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of *R. R. Co.* vs. *Winans,* 17 How. 30, 15 L. Ed. 27. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the Legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: 'This conclusion (argument) implies that the duties imposed upon plaintiff (in error) by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the Legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for public convenience. *Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the Legislature. Seman* vs. *Rufford,* 1 Sim. (N. S.) 550; *Winch* vs. *R. Co.,* 13 L. & Eq. 506.'

"And in the case of *Black* vs *Canal Co.,* 7 C. E. Green, 130 (22 N. J. Eq. 130), Chancellor Zabriskie says: 'It may be considered as settled that a corporation *cannot lease or alienate any franchise or any property necessary to perform* its obligations and duties to the State, *without leg-*

islative authority.' For this he cites some ten or twelve decided cases in England and in this country."

In *Pennsylvania R. R. Co.* vs. *St. Louis, etc., R. R.,* 118 U. S. 290, 309; 30 L. Ed. 80, 83, 92, the Court held:

3. Unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot by lease or other contract turn over to another company for a long period of time its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to run and operate such road, property and franchises of the first corporation. Such a contact is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter. *Thomas* vs. *Railroad Co.,* Bk. 25, reaffirmed.

4. The Act of the Illinois Legislature of February 12, 1855, is a sufficient authority on the part of the St. Louis, Alton and Terra Haute Company to make the lease sued on in this case.

5. But if the other party to the contract, the Indianapolis and St. Louis Company, had no such authority, the contract is void as to it; and if the other Companies had no power to guaranty its performance, it is void as to them, and cannot give a right of action against them.

6. An examination of the Statutes of Indiana and of the decisions of its courts fails to show, in the one or the other, any authority for an Indiana railroad company to make such a contract as that between the principal contracting Companies in this case.

7. Nor is any authority found in the charters of any of these guarantying Companies, or of the laws of the States under which they are organized, to guaranty the performance of such a contract as this, with the parties to it and the road which it relates to being outside the limits of these States, and having no direct connection with their roads.

* * * * *

After quoting from *Thomas* vs. *West Jersey R. R. Co.,* the Court said:

"The reports of decisions in the English courts were very fully examined, as will be seen by reference to cases cited in counsels' briefs, and many of them specially referred to in the opinion; also several cases in this court and in the state courts of this country.

It is not expedient here to go again over the ground there considered, as we are of opinion now, as we were then, that the great preponderance of judicial decisions supports the proposition above stated.

It has been distinctly recognized, and repeated in this court in the case of the *Green Bay & M. R. R. Co.* vs. *Union Steamboat Co.,* 107 U. S. 98 (Bk. 27, L. Ed. 413).

It is cited with approval in the Supreme Court of Massachusetts in the case of *Davis* vs. *Old Colony R. R. Co.,* 131 Mass. 258.

This latter opinion is a very full and able review of all the important decisions on that subject, and sustains very clearly the main propositions.

In this court the principle is completely covered by the decision of the case of *Pearce* vs. *Madison & I. R. R. Co., etc.,* 21 How. 441 (62 U. S. bk. 16, L. Ed. 184), decided in 1858. In that case the defendant companies, whose road at one end of it terminated on the Ohio River, had purchased a steamboat to be used on that river in connection with their freight and passenger traffic, and had given notes for the purchase money. In a suit on these notes this court ruled that they were void for want of any authority in the companies to buy the boat or to engage in the carrying trade on the river.

The opinion delivered by Mr. Justice Campbell cites several of the English cases relied on in *Thomas* vs. *R. R. Co.,* and in *Davis* vs. *Old Colony R. R. Co.,* above referred to, and concludes with the observation that "the opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority." This doctrine had been previously asserted with great force in the case of *York & Maryland Line R. R. Co.* vs. *Winans,* 17 How. 30 (58 U. S. bk. 15, L. Ed. 27).

These are all cases in which railroad companies were parties, and their powers, as regulated by their charters, were the matters mainly considered. There are many other cases of the highest authority where railroad corporations are held to the doctrine laid down in *Thomas* vs. *R. R. Co.; Eastern Counties Railway* vs. *Hawke,* 5 H. L. Cas. 331, 371-381; *Ashbury Railway Carriage and I Co.* vs. *Riche,* L. R. 7 H . L. 653; *McGregor* vs. *Dover & Deal,* R. 18 Q. B. 618; *East Anglian Railway* vs. *Eastern Counties,* R. 11 Q. B. 775.

We think it may be stated, as the just result of these cases and on sound principle, that, unless specially author-

ized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.

In *Valley* vs. *Northern F. & M. Ins. Co.,* 254 U. S. 348, 65 L. Ed. 297, at 299, 301, the Court held and said:

"1. Is a petition to revise in matter of law under Sec. 24 b of the Bankruptcy Act the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealing from the jurisdiction?" Answered, Yes.

"2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation, and therefore within the exceptions of Sec. 4 b of the Bankruptcy Act as amended June 25, 1910 (36 Stat. at L. 839, Chap. 412, Comp. Stat. Sec. 9588, 1 Fed. Stat. Anno. 2d Ed., p. 569), is there such an absence of jurisdiction in the court of bankruptcy that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding be dismissed upon the motion of the bankrupt after the time for appeal has expired?" Answered Yes.

"3. Where an insurance corporation adjudged bankrupt (353) in an involuntary proceeding after the passage of the amendatory Act of June 25, 1910 (36 Stat. at L. 839, chap. 412), upon due service of process and default, does not appeal from the adjudication, but acquiesces therein, and aids the trustee in the performance of his duties in administering the estate, may it be estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed?" Answered No.

Of the construction of the statute there can be no controversy; what answer shall be made to the questions turns

on other considerations,—turns on the effect of the conduct of the company as an estoppel. That it has such effect is contended by the trustee, and there is an express concession that, if objection had been made, the company would have been entitled to a dismissal of the petition. It is, however, insisted that it is settled "that an erroneous adjudication against an exempt corporation, whether made by default or upon a contest or trial before the bankruptcy court, can be attacked only by appeal, writ of error, or prompt motion to vacate", and that Sec. 4 does not relate to the jurisdiction of the court over the subject-matter. "It does not, therefore," is the further contention, "create or limit jurisdiction of the court with respect to its power to consider and pass upon the merits of the petition." And that "the valid exercise of jurisdiction does not depend upon the correctness of the decision". And again, if the court, in the exercise of its jurisdictional power, "reached a wrong conclusion, the judgment is not void, it is merely error to be corrected on appeal or by motion to vacate, timely made; but, as long as it stands, it is binding on everyone". There is plausibility in the propositions, taken in their generality, but there are opposing ones. "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are (354) not voidable, but simply void, and this even prior to reversal. *Elliott* vs. *Peirson*, 1 Pet. 328, 340, 7 L. Ed. 164, 170; *Old Wayne Mut. Life Asso.* vs. *McDonough*, 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236." * * *

"We may use for illustration a municipal corporation. Its creditors may be enterprising, its officers acquiescent or indifferent; can, therefore, the allegations of the former and the default of the latter confer jurisdiction on the district court to entertain a petition in bankruptcy against the corporation, and render a decree therein? And if not, why not? If consent can confirm jurisdiction, why not initially confer jurisdiction? It is not necessary to point out the disorder that would hence result, and the difficulties that the officers of a bankrupt court would encounter in such situation. The legislative power thought care against the possibility of it was necessary, and in that care associated insurance corporations. For a court to extend the act to corporations of either kind is to enact a law, not to execute one."

In *Chicago, B. & Q. R. Co.* vs. *Willard,* 220 U. S. 413; 55 L. Ed. 521, 525, the court held and said, at page 523:

"Had the circuit court jurisdiction of this case? As the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the Federal court without objection, was the circuit court of appeals, or is this court, precluded from considering the question of jurisdiction? These questions can have but one answer. It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of orignal jurisdiction could take cognizance of the case. The leading authority on the subject is *Mansfield, C. & L. M. R. Co.* vs. *Swan,* 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court, 'on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' This rule was said to be inflexible and without exception, and has been uniformly sustained by this court. In *Ayers* vs. *Watson,* 113 U. S. 594, 598, 28 L. Ed. 1093, 1094, 5 Sup. Ct. Rep. 641, Mr. Justice Bradley, speaking for the court, and referring to the 2d section (the removal section) of the act of 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 509), said: 'In the nature of things, the 2d section is jurisdictional, and the 3d is but modal and formal. The conditions of the 2d section are indispensable, and must be shown by the record, the directions of the 3d, though obligatory, may, to a certain extent, be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the 2d section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield, C. & L. M. R. Co.* vs. *Swan,* 111 U. S. 379, 28 L. Ed. 462, 4 Sup. Ct. Rep. 510.' In *Cameron* vs. *Hodges,* 127 U. S. 322, 326, 32 L. Ed. 132, 134, 8 Sup. Ct. Rep. 1154, it

was held to be an express requirement of the statute that the circuit court shall remand a case to the court from which it was removed whenever it appears that it is not one of which the Federal court can properly take cognizance In *Martin* vs. *Baltimore & O. R. Co.* (*Gerling* vs. *Baltimore & O. R. Co.*), 151 U. S. 673, 689, 38 L. Ed. 311, 317, 14 Sup. Ct. Rep. 533, after referring to the judiciary act of 1875, Mr. Justice Gray, speaking for the court, said: 'Diverse state citizenship of the parties, *or some other jurisdictional fact prescribed by the* 2d section, *is absolutely essential, and cannot be waived, and the want of it will be* error at any stage of the cause, even though assigned by the party at whose instance it was committed.' In *Minnesota* vs. *Northern Securities Co.,* 194 U. S. 48, 62, 63, 48 L. Ed. 870, 877, 878, 24 Sup. Ct. Rep. 598, in which both parties insisted upon the jurisdiction of the circuit court, the said court: '*Consent of* (*the*) *parties can* never confer jurisdiction upon a Federal court. *If the record does not affirmatively show jurisdiction* in the circuit court, we *must,* upon our own motion, so *declare,* and make such order as will prevent that court from exercising an authority not confererd upon it by statute.' In *Thomas* vs. *Ohio State University,* 195 U. S. 207, 211, 49 L. Ed. 160, 164, 25 Sup. Ct. Rep. 24: 'It is equally well established that when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal, and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived.' In *Kentucky* vs. *Powers,* 201 U. S. 1, 35, 50 L. Ed. 633, 648, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692, it was said that this court 'must see to it that they (the subordinate courts of the United States) do not usurp authority given to them by acts of Congress,'—citing *Mansfield, C. & L. M. R. Co.* vs. *Swan,* 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510. In *Perez* vs. *Fernandez,* 202 U. S. 80, 100, 50 L. Ed. 942, 949, 26 Sup. Ct. Rep. 561, which came to this court from the district court of the United States for the district of Porto Rico, this court, upon the authority of the Swan and other cases cited, held that 'where the jurisdiction fails, the objection can be raised in this court; if not by the parties, then by the court itself'' There are many other authorities to the same effect, but we cite a few of the additional cases: *King Iron Bridge & Mfg. Co.* vs. *Otoe County,* 120 U. S. 225, 30 L. Ed. 623, 7 Sup. Ct. Rep.

552; *Continental L. Ins. Co.* vs. *Rhoads,* 119 U. S. 237, 30 L. Ed. 380, 7 Sup. Ct. Rep. 193; *Peper* vs. *Fordyce,* 119 U. S. 469, 30 L. Ed. 435, 7 Sup. Ct. Rep. 287; *Blaclock* vs. *Small,* 127 U. S. 96, 103, 105, 32 L. Ed. 70, 73, 8 Sup. Ct. Rep. 1096; *Metcalf* vs. *Watertown,* 128 U. S. 586, 587, 32 L. Ed. 543, 9 Sup. Ct. Rep. 173; *Crehore* vs. *Ohio & M. R. Co.,* 131 U. S. 240, 242, 33 L. Ed. 144, 145, 9 Sup. Ct. Rep. 692; *Graves* vs. *Corbin,* 132 U. S. 571, 589, 33 L. Ed. 462, 468, 10 Sup. Ct. Rep. 196; *Neel* vs. *Pennsylvania Co.,* 157 U. S. 153, 39 L. Ed. 654, 15 Sup. Ct. Rep. 589; *Continental Nat. Bank* vs. *Buford,* 191 U. S. 119, 120, 48 L. Ed. 119, 24 Sup. Ct. Rep. 54."

JOINT RESOLUTION OF MAY 31, 1870.
(16 State 378)

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES IN CONGRESS ASSEMBLED, That the Northern Pacific Railroad Company, be and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior, and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk lien across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as exempted in the charter of said company of eighteen hundred and

sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four, and that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points: PROVIDED, That all lands hereby granted to said company which shall not be sold or dsiposed of *or remain subject* to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder. PROVIDED FURTHER, That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. AND BE IT FURTHER RESOLVED, That Congress may at any time alter or amend this point resolution, having due regard to the rights of said company and any other parties.

In *Louisville Trust Co.* vs. *Louisville N. A. & C. R. Co.,* 174 U. S. 674; 43 L. ed. 1130 the Court said: "But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify, but compel, a court entertaining foreclosure proceedings to give to certain limited

unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been, said that this ruling implies somewhat of a departure from the apparent priority or right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but *also an instrument of public service,* has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. These conclusions, while they to a certain extent ignored the positive promises of contract and recorded obligations, were enforced in obedience to equitable and public considerations. We refer to these matters not for the sake of reviewing those decisions but to note the fact that foreclosure proceedings of mortgages covering extensive railroad properties are not necessarily conducted with the limitations that attend the foreclosures of ordinary real estate mortgages.

* * * * * *

Said: "Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of a mortgagor, the mortgagor and mortgagee can enter into an agreement by which through the form of equitable proceedings all the right of this unsecured creditor may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated."

Beyond the positive and verified statement of the petition of the Louisville Trust Company are many facts appearing in the record which strongly support this allegation. That a corporation whose stock consists of $16,000,000, $7,000,000 of which is preferred stock, all of which must be expected to be wiped out if a mortgage interest of $13,800,000 is fully asserted, hastens into court and confesses judgment on an alleged unsecured liability; on the same day responds to an application for a receiver and assents thereto; makes no effort during the receivership to prevent default in interest obligations; tacitly, at least, consents to an order made on application of the receiver for the issue of $200,000 worth of receiver's certificates in aid of betterments on the road, when the same sum might

have paid the interest and delayed the foreclosure; when foreclosure bills are filed not only makes no denial, but admits all the averments of the mortgage obligation and default—in other words, seems a debtor most willing to have all its property destroyed, and this because of one short wheat crop; these matters suggest, at least, that there is probable truth in the sworn averment of the petitioner that all was done by virtue of an agreement between the mortgagee and mortgagor (bondholder and stockholder) to preserve the relative interests of both, and simply extinguish unsecured indebtedness. When, in addition to this fact, it appears that these proceedings are initiated within a few days after a decree of the circuit court of appeals—a decree final unless brought to this court for review in its discretion by *certiorari;* that a large amount of unsecured indebtedness was by that decree cast upon the mortgagor, we cannot doubt that such a condition of things was presented to the trial court that it ought, in discharge of its obligations to all parties interested in the property, to have made inquiry and ascertained that no such purpose as was alleged in the intervening petition was to be consummated by the foreclosure proceedings.

* * * * * *

It is also true that no evidence was offered by the petitioner in support of the allegations of its petition, but it is not true that in revising and reversing the final action of the circuit court we are acting on mere suspicion, or disturbing either settled rules or admitted rights. The allegations of this intervening petition as to the wrong intended and being consummated were specific and verified. The delay, under the circumstances was not such as to deprive the petitioner of a right to be heard. The facts apparent on the face of the record were such as justified inquiry, and upon those facts, supported by the positive and verified allegations of the petitioner, it was the duty of the trial court to have stayed proceedings, and given time to produce evidence in support of the charges Taking them as a whole, they are very suggestive, independent of positive allegation; so suggestive at least, that, when a distinct and verified charge of wrong was made, the court should have investigated it.

* * * * * *

It is no answer to these objections to say that a bondholder may foreclose in his own separate interest, and, after acquiring title to the mortgaged property, may give

what interest he pleases to anyone, whether stockholder or not, and so these several mortgagees foreclosing their mortgages, if proceeding in their own interest, if acquiring title for themselves alone, may donate what interests in the property, acquired by foreclosure they desire. But human nature is something whose action can never be ignored in the courts, and parties who have acquired full and abslute title to property are not as a rule donating any interest therein to strangers. It is one thing for a bondholder who has acquired absolute title by foreclosure to mortgaged property to thereafter give of his interest to others, and an entirely different thing whether such bondholder, to destroy the interest of all unsecured creditors, to secure a waiver of all objections on the part of the stockholder and consummate speedily the foreclosure, may proffer to him an interest in the property after the foreclosure The former may be beyond the power of the courts to inquire into or condemn. The latter is something which on the face of it deserves the condemnation of every court, and should never be aided by any decree or order thereof. It involves an offer, a temptation, to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but in fact by the unsecured creditor.

* * * * * *

But considering the public interests in the property the peculiar circumstances which attend large railroad mortgages, must see to it that all equitable rights in or connected with the property are secured.

In *U. S.* vs. *Union Pacific R. R. Co.*, 98 U. S. 569, 25 L. ed. 143, the Court said: "The Act of Congress making appropriations for the legislative, executive and judicial expenses of the Government, approved March 3, 1873, has the following language in its fourth and last section:

'The Attorney General shall cause a suit in equity to be instituted, in the name of the United States, against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity; or who may have recived as profits or proceeds of contracts for construction or equipment of said road, or other contracts therewith, moneys or other property

which ought, in equity, to belong to said railroad corporation; or who may, under pretense of having complied with the acts to which this is an addition, have wrongfully and unlawfully, received from the United States bonds, moneys or lands, which ought, in equity, to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, which ever shall in equity be held entitled thereto. Said suit may be brought in the circuit court in any circuit, and all said parties may be made defendants in one suit. Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination of the cause against other parties. The court where said cause is pending may make such orders and decrees, and issue such process as it shall deem necessary to bring in new parties, or the representatives of parties deceased, or to carry into effect the purposes of this Act. On filing the bill, writs of subpoena may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district.' 17 Stat. at L. 508.

"Following this, and part of the same section, are certain provisions for the future government of the Railroad Company and its officers to-wit: that its books and correspondence shall at all times be open to inspection by the Secretary of the Treasury; that no dividend shall be made but from actual net earnings, and no new stock issued or mortgages created without consent of Congress; and punishing directors who shall violate these provisions. Also enacting that the Corporation shall not be subject to the bankrupt law, and shall be subjectt o a mandamus to compel it to operate its road, as required by law.

"A previous section of the Act directs the Secretary of the Treasury to withhold from every railroad company which has failed to pay the interest on bonds advanced to it by the Government, all payments on account of freights or transportation over such roads, to the amount of such interest paid by the United States, and also the *fiver* per cent. of the net earnings of the roads due and unapplied as provided by law; and it authorized the companies who might wish to contest the right to withhold these payments

to bring suit against the United States in the Court of claims for the money so withheld."

* * * * * *

"The question is, therefore, squarely presented to us for decision, as it was to the circuit court, whether this bill can be sustained under the general principles of equity jurisprudence by the aid of the special statute, and within the limits of the power intended to be conferred by the statute.

"We say by the aid of the special statute, because it is conceded on all sides that the bill cannot stand without that aid. The service of compulsory process on parties residing without the limits of the districts of Connecticut, who are not found within those limits, is expressly forbidden by the general statute defining the jurisdiction of the circuit courts. Parties and subjects of complaint are brought together in one suit by this bill which, by the accepted canons of equity pleading, are incongruous and multifarious, having no proper connection with each other, except as they are so grouped in this bill. This, and other matters of like character, are proper causes of *demurer,* and fatal to this bill, unless the difficulty be cured by the statute.

"When we recur to the provisions of the Act which are said to authorize these and other departures from the general rules of equity procedure, counsel for appellees reply that the statute is unconstitutional; that it is not only void in the particulars just alluded to, but that is is absolutely void as affecting the substantial rights of defendants in regard to matters beyond the legislative power of Congress.

* * * * * *

"Whether parties, to a suit shall be compelled to answer in any court of the United States wherever they may be served with process, or shall only be bound to appear when found within the district where the suit is brought, is mere matter of legislative discretion, a discretion which ought to be governed by considerations of convenience, expense, etc., but which, when exercised by Congress, is controlling in the courts.

"So, also, the doctrine of multifariousness; whether it relate to improperly combining persons or grievances in the bill, is a rule of courts of equity adopted by those courts on the same principle. It has been found convenient in the administration of justice, and promotive of that end, that

parties who have no proper connection with each other shall not be compelled to litigate together in the same suit, and that matters shall not be alleged and litigated in one suit which are wholly distinct from and have no relation to each other, and which require defenses equally unconnected. The rule itself, however, is a very accommodating one, and by no means inflexible. Such as it is, however, it is under the control of the legislative will, and may be modified, limited and controlled by the same power which creates the court and confers its jurisdiction. It is simply a matter of practice. The Constitution imposes no restraint in this respect upon the legislative power of Congress."

* * * * * *

"This court said, in the case of *Bk.* vs. *Okely,* 4 Wheat., 235, in speaking of a summary proceeding given by the charter of that bank for the collection of its debts.

'It is the remedy, and not the rights, and as such we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent Legislatures." And in *Young* vs. *Bk.,* 4 Cranch, 397, Chief Justice Marshall says: "There is a difference between these rights on which the validity of the transactions of the corporation depends, which must adhere to these transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last can only exercised in those courts which the power making the grant can regulate." See, also, *Canal Co.* vs. *Com.,* 43 Pa., 227; *Maryland* vs. *R. R. Co.,* 18 Md., 193; *Colby* vs. *Dennis,* 36 Me., 1; *Gowen* vs. *R. R. Co.,* 44 Me., 140.

"This class of statutes, if not so common as to be called ordinary legislation, are yet frequent enough to justify us in saying that they are well recognized acts of legislative power uniformly sustained by the courts.

"It may be said, and probably with truth, that such statutes, when they have been held to be valid by the courts, do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power or to give improved methods of procedure to the courts in dealing with existing rights."

* * * * * *

"We are of opinion, therefore, that the Act under which this suit is brought was not intended to change the substantial rights of the parties to the suit which it authorized, and that it was intended to provide a specific method of procedure, which, by removing restrictions on the jurisdiction, processes and pleading in ordinary cases; would give a larger scope for the action of the court, and a more economical and *efficient remedy than existed before;* and that it is a valid and constitutional exercise of legislative power."

* * * * *

"The difficulty is, to whom shall this money be paid when recovered, and can it be recovered in this suit? If the Railroad Corporation, *falling into purer hands,* had brought such a suit, the bill might be sustained.

"But *the Corporation is not plaintiff here. It seeks no relief for these wrongs. It may have been the design of the law to give the Corporation an opportunity by a cross-bill against the* other defendants, who are charged with these frauds to obtain relief against them. *Such a bill, if not strictly within the rule of equity procedure, which only allows a defendant to file a cross-bill against a plaintiff, might be sustained under the provisions of this statute.*

"But the Corporation files no such bill. It desires no such relief. On the contrary, it resists by demurrer any further proceeding in the matter."

* * * * *

"The truth is, that the persons who were actually defrauded by these transactions, if any such there be, *were the few bona fide holders of the stock of the Corporation* who took no part in these proceedings, and had no interest in the fraudulent contracts. But it is not alleged that there were such. If there are any such, they are not made parties to this bill, nor *does the bill provide any relief for them.* Yet, a moment's consideration will show that they alone (to say nothing of plaintiffs for the present) suffered any legal injury, or are entitled to any relief. As to the directors and stockholders who took part in these fraudulent contracts, they are *participes criminis,* and can have no relief. This class probably included nine-tenths in value of the shareholders. It is against all the principles of jurisprudence, whether at law or in equity, to permit them to litigate this fraud among themselves. If

the innocent stockholders are not parties here, we have already seen that, with the power of the directors over the money recovered, they would get no relief by the suit.

"The statute, however, did not permit them to be made parties. Their interest is not the same as the Company. The statute provides only for collection and payments of money or restoration of property, or its value, to the railroad corporation, or to the United States, as either of them may be in equity held entitled thereto. This does not embrace what a defrauded stockholder may be entitled to in his individual right."

ASSIGNMENTS OF ERROR.

I.

The Court erred in denying leave to file the Intervening Petition of these petitioners filed on January 31, 1938, as the said Petition stated a good cause of action is timely and sought relief and prevention of delivery to the Northern Pacific Railway Company, of lands or other value, which the said Northern Pacific Railroad Company had not taken possession of, but which it is seeking in this suit.

II.

These Petitioners adopt and make part of this Assignment of Errors, each and all the Assignments of Error filed by the Northern Pacific Railroad Company by Charles E. Schmidt, and other minority stockholders in this cause, this day, except Assignments of Error Number 10 and number 11, and make such Assignments of Errors applicable to all pleadings filed by these petitioners.

NOW COMES The Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders and makes, presents and files the following Assignments of Error on appeal.

I.

The Court erred in the Decree of May 24, 1932, by referring this cause on a Motion of the Railway Company and others (to which Motion the Railroad Company was not a party, though the Decree by mistake states it was on the Motion of the Northern Pacific Railroad Company) to the Special Master on the pleas, motions to dismiss and other pleadings as such reference was in violation of equity rule 59 as construed by *In re* Parker, 283 Fed. 404 at 408 (4) Ill. (C. C. A. 7), which reversed and cancelled such a reference; *in re* King, 179 Fed. 694 (C. C. A. 7), and *in re* Bartleson Co., 243 Fed. 1001 (D. C. Fla), and as this decree was sustained by the decrees of October 3, 1935, as amended by the Decree of January 29, 1936, affirming the report of the Special Master under the decree of May 24, 1932, the court again erred.

II.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 1 filed for the Northern Pacific Railroad Company by Attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the general motion to dismiss filed for the Northern Pacific Railroad Company by the Attorneys for the Northern Pacific Railway Company (Report, page 35).

III.

The Court erred in denying said general Motion to dismiss the Bill and Amended Bill, as the said Bill and Amended Bill did not put in issue the validity of the foreclosures of the mortgages claimed to have been executed by the Northrn Pacific Railroad Company, which included the question or issue of the power of the Northern Pacific Railroad Company to place more than one mortgage on the lands granted, nor did the Bill or Amended Bill put in issue the other disputes mentioned in the last clause

of Section 5 of the Act of June 25, 1929, which directed and made it mandatory on Attorney General to put in issue and to have determined by the court.

IV.

If the court held, as it now states it did, that the validity of the said mortgages was determined in confirming the first report of the Special Master, by the decree of Oct. 3, 1935, as amended Jan. 29, 1936, such ruling and determination was erroneous as the said validity of said mortgages was not pleaded, was not in issue, was not contested, and there was no evidence on the point, and the reference was on the pleading.

V.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amendde January 29, 1936, by overruling Exception No. 2, filed for the Northern Pacific Railroad Company, by attorneys for the Northern Pacific Railway Company, to the first Report of the Special Master filed May 31, 1933, thus holding that the plea of laches was not maintainable against the land grant (Report, pages 36-37).

VI.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 3, filed for the Northern Pacific Railroad Company by Attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the plea of *res adjudicata* (Report, page 38).

VII.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 4, filed for the Northern Pacific Railroad Company by Attorneys for

the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933 (Report, page 95).

VIII.

The court erred in its decree of March 9, 1938, by denying the Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, filed February 19, 1938, to construe, modify and amend the second report of the Special Master filed July 26, 1937, as the court thus left the Report confusing and contradictory as to the ownership of the Northern Pacific Railroad properties, lands and land grants, and the court further erred by refusing to construe and amend said report to make it state that title to and ownership of the Northern Pacific Railroad properties and lands and land grants were in the Northern Pacific Railroad Company, or to reserve the question of such title and ownership until it could be determined on the Answer and Cross-bill of the Northern Pacific Railroad Company filed by Charles E. Schmidt and other minority stockholders, September 3, 1937, and or the Intervening Petition of Charles E. Schmidt and other minority stockholders filed January 31, 1938; the Master's Report indicates 34 plus, times that the property and lands belong to "the company" without indicating what company, 18-plus times to the Railway Company, and a number of times to the Railroad Company.

IX.

The Court also erred in its Decree of March 22nd, 1938, by denying the Petition and Motion to Rehear of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders, filed March 11, 1938, on these points.

X.

The Court erred in its decree of March 9, 1938, by striking the Answer and Cross-bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other mi-

nority Stockholders, filed September 3, 1937, as motions to strike go only to the form and not the merits, and the said Answer and Cross-bill are perfect as to form, and no objection pointed out as to form; the Northern Pacific Railway Company filed a Motion to Strike the said Cross-bill and Answer, and plaintiff filed a Motion entitled, Motion to Strike, and asked that the Answer and Cross-bill be stricken, but it included a clause asking that Cross-bill be dismissed as it did not state a cause of action against the United States, but did not put up a defense of laches or any other specific defense.

XI.

The Court erred in its decree of March 22, 1938, by denying the Petition and Motion of the Northern Pacific Railroad Company to rehear the Decree of March 9, 1938, and to allow the Northern Pacific Railroad Company to amend at bar its cross-bill and answer by making the intervening Petition of Charles E. Schmidt and other minority stockholders, and each of the allegations thereof, a part of the said Cross-bill and Answer, as this would not have worked any delay, the Cross-bill and Answer had not been dismissed and the parties put out of court, but the Cross-bill and Answer had only been stricken, and under the liberal rules of amending, the Railroad Company was entitled to amend as of right; there was no answer, plea or motion to strike or dismiss the said Petition and motion, or other objection thereto, filed, against the motion to rehear and amend, and it was denied and not stricken; leave to amend was asked in Paragraph XXI, and others of cross-bill.

XII.

The Court erred in the Decree of March 9, 1938, by striking the joinder in the Motion of the Northern Pacific Railroad Company to re-refer the cause to the Special Master, which joinder was filed February 19th, 1938, as there was no Motion filed to strike the said joinder, (a) it

was erroneous to strike it as the Northern Pacific Railroad Company is vitally interested in the report and having it properly completed by further reference, and (b) the Court cannot of its own motion, strike a pleading from the files as Motions to Strike go only to form.

XIII.

The Court erred in its decree of March 9, 1938, by striking the exceptions filed February 19, 1938, to report of July 26, 1937, by the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, as under the allegations of the Answer and Cross-bill which were not denied that ownership and title of the properties, lands and land grants of the Northern Pacific Railroad are in the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company holding the Northern Pacific Railroad Company in captivity through the Northern Pacific Railway Company's Attorneys, filed a disclaimer of title and ownership of the Northern Pacific Railroad Company to the said property, lands and land grants, and was not properly representing, preserving or protecting the rights of the Northern Pacific Railroad Company;

The Court erred in its Decree of March 22, 1938, in denying the Petition and Motion to rehear the Decree of March 9th, 1938, on the exceptions, as the allegations of the said Petition and Motion were not denied but admitted, and there was no Motion to Dismiss, strike or other objection filed against it, nor was there any denial of the allegations of the said Answer and Cross-bill, and of the said Intervening Petition.

XIV.

The Court erred in its Decree of March 9th, 1938, in striking the Motion of the Northern Pacific Railroad Company for an extension of time to file exception to the Spe-

cial Master's Report filed July 26th, 1937, as there was no Motion to Strike the said Motion to extend time, and the exceptions of the Northern Pacific Railroad Company were filed on February 19th, 1938, prior to the hearing on the Motion to Extend Time; it is settled practice of the courts that when a Motion to Extend Time is filed for the performance of said Act, that if the Act is performed before the Motion is acted on, that the Motion to extend the time to the date of the actual filing will thereby, as a matter of course, be granted.

XV.

The Court ererd in striking pleadings to which there were no Motions to Strike, thus holding that the court, of its own motion, can strike a pleading.

XVI.

As the Court gave as one reason for striking the Answer and Cross-bill of the Northern Pacific Railroad Company, by Charles E. Schmidt, and other minority stockholders, and for denying leave to file the Intervening Petition, that the court had by the Decree of October 3, 1935, as amended January 29, 1936, confirming the Firt Report of Special Master, held that the Mortgages claimed to have been executed by the Northern Pacific Railroad Company, were valid (and called upon the Special Master in Open Court to confirm same) and as the Court thus erroneously construed and reviewed the decree of October 3, 1935, as amended January 29th, 1936, the Court erred in striking the said Answer and Cross-bill and in refusing leave to file said Intervening Petition, as a review and examination of the First Report of the Special Master and the Decree of October 3, 1935, as amended January 29, 1936, confirming said report, will clearly demonstrate that the Court did not attempt to, nor in any manner, determine that said mortgages were valid.

XVII.

The Court erred in striking out the Cross-bill and Answer of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, as facts alleged therein, and admitted as true, show the title of the Northern Pacific Railroad Company properties, lands and land grants had never passed out of the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company had been absorbed by or was owned by the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company was never organized, and Acts purporting to amend its charter were void and unconstitutional, and all that the Northern Pacific Railway Company attempted to do was *ultra vires* and void; that further, because the Northern Pacific Railroad Company had no power under its Charter or laws to sell or convey its properties or lands, or to give a long time lease on same, and the Northern Pacific Railway Company under the laws of Wisconsin and the other states, traversed by the Northern Pacific Railroad system was not given authority or power to purchase, receive or have turned over to it by lease or other contract, the said Northern Pacific Railroad Company property.

XVIII.

The Court erred in stating and holding that laches prevented the Northern Pacific Railroad Company from seeking to prevent in this suit the Northern Pacific Railway Company from unlawfully seizing and taking possession of lands under the land agent, or their value, which said land or land grants had not been heretofore seized or taken possession of or any title thereto given to the Northern Pacific Railway Company, and the same is not yet in its power or possession, and neither laches or the statue of limitations would begin to run until the Northern Pacific Railway Company actually obtained possession. The Court held this, notwithstanding the petitioners who filed an Answer and cross-bill began in 1897 and 1898, and have

continued persistently to date to have the rights of the Northern Pacific Railroad Company determined and possession of its Railroad System land grants and property, title to which has never gone out to the Northern Pacific Railroad Company, restored to the Northern Pacific Railroad Company; and further, that the minority stockholders on behalf of themselves and petitioners, and aided by them on November 21st, 1900, instituted a suit in the Circuit Court of the United States in the Southern District of New York, seeking relief sought in the answer and cross-bill, which suit is still pending and undetermined, and was recently revived by the Court in the name of the Executor of the Plaintiff, and further these petitioners had since 1900 continuously sought a Congressional Investigation so as to obtain the facts set out in the Answer and Cross-bill and Intervening Petition, which were hidden and secreted by the Northern Pacific Railway Company, and other facts, which are still hidden and secreted by the Railway Company and Petitioners believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the Petitioners and information they furnished the Government.

XIX.

The Court erred in the Decree of March 2nd, 1938, in denying on the merits, and not striking the Motion to Dismiss the Bill and Amended Bill of Complaint, which Motion was filed by the Northern Pacific Railroad Company by Charles E. Schmidt and Minority Stockholders, March 17, 1938, and in not granting the Motion and giving leave to and requiring the plaintiff to file an amended Bill putting in issue the validity of the foreclosure of the mortgages claimed to have been executed by the Railroad Company and the other matters required by the mandate of

the Act of June 25, 1929, as set out in part in the said Motion, and as shown by the said Act.

XX.

The Court erred in holding that the United States was not estopped to object to or oppose the answer and cross-bill and the Motion to Amend same, or the intervening petition, or to move to strike or dismiss either because the Attorney General failed to put in issue or prosecute to determination the validity of the two foreclosures of the mortgages and the disputes set out in the last clause of Section 5 in the Act of June 25, 1929 (46 Stats. 41).

XXI.

The Court erred in holding that the Northern Pacific Railroad Company was not estopped to object to or oppose the Answer or Cross-bill, or Motion to Amend same, or the Intervening Petition, or move to strike either, because the Northern Pacific Railway Company illegally and unlawfully, without any power or authority under its Charter, or by any State Law to do so, had seized and is holding all of the property, lands and land-grants of the Railroad Company, except such as are involved in this suit and had unlawfully taken and placed the Northern Pacific Railroad Company in captivity under its domination and control, and while so illegally and unlawfully holding said Northern Pacific Railroad Company in such captivity, since 1897, the Northern Pacific Railway Company had filed, through its attorneys, a disclaimer of any claim or interest of the Northern Pacific Railroad Company in and to any properties, lands or land grants under the Act of July 2, 1864, and the Northern Pacific Railway Company is now in this suit seeking to and endeavoring to unlawfully and illegally seize and take possession of land or their value, of the Northern Pacific Railroad Company, which the Northern Pacific Railway Company had not heretofore been able to seize and take possession of as is shown by

the allegations of the Answer and Cross-bill and Intervening Petition, which allegations on the Motions are not denied, but admitted to be true.

XXII.

The Court erred in refusing to hold that as alleged in the Answer and Cross-Bill and Intervening Petition, and admitted, that when Congress passed the Act of June 25, 1929, it made it mandatory on the Attorney General, and the Court, to have determined in the suit under proper allegations in the Bill of Complaint, all the rights of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, as is shown by chairman Colton Report for the committee to the House, and as these matters were purposely left open for future determination by Act of July 1, 1898 (30 Stats. 620), and by the said Act Congress purposely agreed and gave its consent for the United States to be sued or to be a party to litigation between the Northern Pacific Railroad Company and the Northern Pacific Railway Company, as Congress construed the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, to make it mandatory that the United States be a party to all suits and litigations involving the land, land grants and mortgages authorized thereunder, and that such rights could not be determined in any other litigation, as the United States could not be made a party to any other such litigation.

XXIII.

The Court erred in holding that it is now too late for the Answer and Cross-bill and Intervening Petition to be filed in this cause, notwithstanding it took the court, and parties, *five years, six months and twenty-eight days* from July 31, 1930, to January 29, 1936, to settle the pleadings, at a cost considerably in excess of $25,000.00, on January 29th, 1936, and until that time the minority stockholders did not definitely know, and could not know, that the At-

torney General, in dereliction of his duty, and the Mandate of Congress to him and the court, would ignore the mandatory direction of the Court requiring him to have all rights of the Northern Pacific Railroad Company and Northern Pacific Railway Company to the land, land grants and properties, and the validity of the foreclosure of the mortgages in 1875 and 1896 determined, and further, notwithstanding that the Northern Pacific Railway Company is now in this suit trying to illegally and unlawfully grab, take, seize and possess further and other lands, or their value of the Northern Pacific Railroad Company, while the Northern Pacific Railway Company holds the Northern Pacific Railroad Company in captivity.

XXIV.

The Court erred in stating in its decision that the Petitioners on behalf of the Northern Pacific Railway Company can come back into this cause to determine the ownership of the fund established after such fund is established, but refused to put in the Decree words confirming such decision, but used words which would be construed to create *res adjudicata* to further proceedings on behalf of the Northern Pacific Railroad Company in this cause, and in addition to that the court denied the Motion of the Northern Pacific Railroad Company to construe, modify and amend the Report of the Special Master filed July 26, 1937.

XXV.

The Court erred in sustaining the plaintiff's Exception numbered 12, involving Absaroka and Beartooth forest.

XXVI.

The Court erred in sustaining plaintiff's Exceptions No. 16 to 27, inclusive, and Nos. 38 and 39, involving substitution of base.

XXVII.

The Court erred in sustaining the plaintiff's Exception numbered 40, 43 (a), (b), (d) and (e), 44, 48, and 49, involving the availability of withdrawing lands for indemnity selection, and Nos. 55 and 56 involving Fort Ellis Military Reservation.

XXVIII.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 1.

XXIX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 2, involving the Portland Oregon & Tacoma Washington overlap.

XXX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 3, involving losses in the Second Indemnity limits of a particular state.

XXXI.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 4.

XXXII.

The Court erred in the Orders of March 9th, 1938, and of March 22nd, 1938, in striking out the Answer and Cross-Bill, in not permitting the filing of the Intervention Petition, and in not requiring the Northern Pacific Railway Company and plaintiff to answer same, and in not requiring the Northern Pacific Railway Company to answer the Interrogatories and produce the papers and documents called for in the interrogatories, as this Appellant is entitled, and it is necessary for appellant in preparation for the hearing on the ownership of the funds and property to be established, to have said data and documents.

In *Northern Indiana Railroad Company* vs. *Michigan Central Railroad Company,* 15 How. 233, 14 L. Ed. 674, it was held that where the Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter.

Another Company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States for the District of Michigan, against the Michigan Company, praying an injunction to prevent the construction of the road under the above agreement.

The Circuit Court had no jurisdiction over such a case.

The subject matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo.*

Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The Act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present.

The court, at p. 243 (679), said: "The controversy before us does not arise out of a contract, nor is it connected with a trust expressed or implied. An exclusive right is claimed by the complainants, under their charters, and the legislative Acts of Indiana connected therewith, to construct and use a railroad, as they have done, from the City of Michigan to the western line of the State. And they complain that the defendants have unlawfully entered upon their grounds, constructed a road crossing the complainants' road several times, and materially injuring it, by constructing a road parallel to it. Relief is prayed for an injury threatened or done to their real estate in Indiana, and to their franchise, which is inseparably connected with the realty in that State.

"In the investigation of this case, rights to real estate must be examined, which have been acquired by pur-

chase, or by a summary proceeding under the laws of Indiana. This applies, especially, to the ground on which the complainants' road is constructed, and to other lands which have been obtained, for the erection of facilities connected with their road. And, in addition to this, the chartered rights claimed by the defendants, and the right asserted by them to construct their road as they have done, crossing the complainants' road and running parallel to it, must also be investigated. Locality is connected with every claim set up by the complainants, and with every wrong charged aganist the defendants. In the course of such an investigation, it may be necessary to direct an issue to try the title of the parties, or to assess the damages complained of in the bill.

"It will readily be admitted, that no action at law could be sustained in the district of Michigan, on such ground, for injuries done in Indiana. No action of ejectment, or for trespass on real property, could have a more decidedly local character than the appropriate remedy for the injuries complained of. And is this changed by a bill in chancery? By such a procedure, we acquire jurisdiction of the defendants, but the subject matter being local, it cannot be reached by a chancery jurisdiction, exercised in the State of Michigan. A state court of Michigan, having chancery powers, may take the same jurisdiction, in relation to this matter, which belongs to the Circuit Court of the United States, sitting in the district of Michigan. And it is supposed that no court in that State could assume such a jurisdiction.

"But there remains another ground of objection to the jurisdiction in this case. The New Albany and Salem Railroad Company is not made a party to this suit."

In 1823 the nation, by the Supreme Court, through Chief Justice John Marshall, stated the rules and principles respecting the use and disposition of the lands and territory of the United States, intrusted by the Constitution to the Government and its Congress as follows: The right of discovery given by this Commission to Cabot is confined to countries then unknown to all Christian people, and of these countries, Cabot was empowered to take possession for and in the name of the King of England, thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens. To this discovery (by Cabot under his commission of 1796) the English traced their title, the Court said, "As the right of society to pre-

scribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of His creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision".

Johnson vs. *McIntosh,* 21 U. S. 522, 5 L. Ed. 688.

The Government by Congress enacted in 1864, 1870, 1898 and 1929, the laws and principles applicable in this particular case as contained in the charter, with its various obligations as land grant contracts, etc., which is given to the courts as their guide in settling the rights of the interveners, as well as other parties in the present litigation.

In *Caldwell* vs. *Taggart,* 4 Peters 190, at 202, 7 L. Ed. 190, at 201, where a bill was filed to compel the execution of securities for money loaned, which securities, it was alleged in the bill, were promised to be given upon particular real estate purchased by the money loaned, and the complainants had omitted to make the prior mortgagees of the premises on which the securities were required to be given, parties to the bill, the court said: "In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is, therefore, bound to employ those means in the exercise of its jurisdiction.

"There is no want of learning in the books on this subject. The general rule is laid down thus: 'However numerous the persons interested in the subject of a suit,

they must all be made parties plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.' And again, 'all persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit', extending in most cases to heirs-at-law, trustees and executors.''

In *Minnesota* vs. *Northern Securities Co.,* 184 U. S. 199, at 244, 46 L. Ed. 499, at 519, the Court said: ''More briefly stated, the case presented by the charges and prayers of the bill is that the state of Minnesota is apprehensive that a majority of the stockholders, respectively, of the Great Northern Railway Company and of the Northern Pacific Railway Company have combined and made an arrangement, through the organization of a corporation of the state of New Jersey, whereby such a consolidation, or, what is alleged to amount to the same thing, a joint control and management of the Great Northern and Northern Pacific Railway Companies, shall be effected as will operate to defeat and overrule the policy of the state in prohibiting the consolidation of parallel and competing lines of railway, and, therefore, appeals to a court of equity to prevent by injunction the operation and effect of such a combination and arrangement.

''But at once, as we have seen, the court is put upon inquiry whether the parties and persons to be affected by such an injunction are before it.

''The narrative of the bill unquestionably discloses that the parties to be affected by a decision of the controversy are, directly, the state of Minnesota, the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that state, and the Northern Securities Company, a corporation of the state of New Jersey, and, indirectly, the stockholders and bondholders of those corporations and of the numerous railway companies whose lines are alleged to be owned, managed, or controlled by the Great Northern and Northern Pacific Railway Companies.

''Can such a controversy be determined, with due regard to the interests of all concerned, by a suit solely between the state of Minnesota and the Northern Securities

Company? It is, indeed, alleged that all of the stockholders of the Northern Securities Company are stockholders in the two railroad companies, and, therefore, it may be said that the latter stockholders are sufficiently represented in the litigation by the Northern Securities Company; but it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company. It is obvious, therefore, that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company. They have a right to be represented in the controversy by the companies whose stock they hold, and their rights ought not to be affected without a hearing, even if it were conceded that a majority of the stock in such companies, held by a few persons, had assisted in forming some sort of an illegal arrangement. Moreover, it must not be overlooked that it is not the private interests of stockholders that are to be alone considered. The directors of the Great Northern and Northern Pacific Railway Companies are appointed to represent and protect, not merely the private and pecuniary interests of the stockholders, but the rights of the public at large, which is deeply concerned in the proper and advantageous management of these public highways. It is not sufficient to say that the attorney-general, or the governor, or even the legislature of the state, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a state when she voluntarily becomes a complainant in a court of equity cannot claim to represent both sides of the controversy. Not only have the stockholders, be they few or many, a right to be heard, through the officers and directors whom they have legally selected to represent them, but the general interests of the public, which hight be deeply affected by the decree of the court, are entitled to be heard; and that, when the state is the complainant and in a case like the present, can only be effected by the presence of the railroad companies as parties defendant.

"Upon investigation it might turn out that the allegations of the bill are well founded, and that the state is en-

titled to relief; or it might turn out that the allegations of the bill are well founded, and that the state is entitled to relief; or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard of the policy of the state, but that what is proposed is consistent with that policy and advantageous to the communities affected. But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.''

In the Bankhead Cotton Pool Act case of *Thompson* vs. *Deal*, 67 App. D. C. 327, 92 F. (2d) 478, 65 W. L. R. 734, the Court held:

(c) That the suit, being one brought to impress a fund with a trust and compel its restoration to those entitled thereto, was properly brought as a class suit.

(d) That the duress or *compulsion* exercised by the Manager of the Pool in requiring payments for the exemption certificates purchased from him was attributable to the depositors in the Pool, he being their agent and acting under an invalid law.

The Court said: 3rd. Nor do we think that there is any point in the objection made, but not strongly urged, that this is not properly a class suit. Here each of the appellants and every other person similarly situated has an identical interest in a single fund. Each bears the same relation to the fund, and a disposition of the case as to one will decide the rights of all. Appellants say the suit is not brought to rescind a contract of sale, but to restrain the completion of an unlawful statutory scheme participated in by appellees and by the depositors in the pool agreement to take appellants' money for the benefit of the depositors, and that the suit is brought to enjoin the further dissipation

of trust funds belonging to appellants to prevent appellees from paying such fund to innumerable persons not entitled to it, and thereby placing the fund beyond their reach.

We think the suit is in the nature of an action to impress a fund with a trust and compel its restoration, and we think it is properly brought as a class suit. Here there is an identity of parties and an identity of interests; if one of the appellants can recover, all can recover, and if they do not proceed as a class there must then be a multiplicity of suits. The governing rule is stated in *Hartford Life Insurance Co.* vs. *Ibs,* 237 U. S. 662-672, and *Watson* vs. *National Life & Trust Co.,* 162 F. 7.

4th. The argument on behalf of the government is that appellants were not coerced into doing business with Manager Deal. Counsel say that officer could not compel appellants to purchase certificates from the pool, that appellants could just as well have complied with the tax provisions of the Act, and in that case would have had recourse against the United States for the recovery of the taxes if the exaction was shown to be invalid. From these facts they draw the conclusion that appellants' purchase of pool certificates was due to their own voluntary desire to avoid payment of the tax and thus to save money. This, they say, is not duress. Summarized, the argument is that appellants are not seeking the recovery of money wrongfully exacted by the government or by some party acting in behalf of the government who has exerted compulsion upon them, but are seeking to recover money paid to entirely innocent third parties, who gave to appellants in return for their money property rightfully belonging to those third parties. But we think this contention cannot be sustained. The government had no right to limit the production of cotton or to use the taxing power exclusively to accomplish that end. We are not saying that a tax on the processing of cotton is objectionable; but the Bankhead Act did not impose a true tax and was not designed to raise revenue. It was—as it was intended to be—only a coercive measure supplemental to the Agricultural Adjustment Act.

The duress situation which the Supreme Court found to exist in the Act challenged in *United States* vs. *Butler,* is as apparent here as there. And as to the provisions of the Act there, the Court said: "The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient

to exert pressure on him to agree to the proposed regulation. *The power to confer or withhold unlimited benefits is the power to coerce or destroy.* If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The results may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remains a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the *Bankhead Cotton Act,* used the taxing power in a *more directly minatory fashion to compel submission.* This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present Act. * * * *This is coercion by economic pressure. The asserted power of choice is illusory.*" 297 U. S. 1, at 70, 71; 80 L. Ed. 477, at 491.